

UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURE DECISIONS

DECISIONS OF THE SECRETARY OF AGRICULTURE

ISSUED UNDER THE

REGULATORY LAWS ADMINISTERED BY THE

UNITED STATES DEPARTMENT OF AGRICULTURE

(Including Court Decisions)



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PREFATORY NOTE

It is the purpose of this official publication to make available to the public, in an orderly and accessible form, decisions issued under regulatory laws administered by the Department of Agriculture.

The decisions published herein may be described generally as decisions which are made in proceedings of a quasi-judicial character, and which, under the applicable statutes, can be made by the Secretary of Agriculture, or an officer authorized by law to act in his stead, only after notice and hearing or opportunity for a hearing. These decisions do not include rules and regulations of general applicability which are required to be published in the Federal Register.

The principal statutes concerned are the Agricultural Marketing Act of 1946 (7 U.S.C. 1621 *et seq.*), the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601 *et seq.*), the Animal Quarantine and Related Laws (21 U.S.C. 111 *et seq.*), the Animal Welfare Act (7 U.S.C. 2131 *et seq.*), the Federal Meat Inspection Act (21 U.S.C. 601 *et seq.*), the Grain Standards Act (7 U.S.C. 1821 *et seq.*), the Horse Protection Act (15 U.S.C. 1821 *et seq.*), the Packers and Stockyards Act, 1921 (7 U.S.C. 181 *et seq.*), the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499a *et seq.*), the Plant Quarantine Act (7 U.S.C. 151 *et seq.*), the Poultry Products Inspection Act (21 U.S.C. 451 *et seq.*), and the Virus-Serum-Toxin Act of 1913 (21 U.S.C. 151-158).

The decisions published herein are arranged alphabetically by statute and within the statute section by date of issue or date the decision became final after expiration of the appeal period. They may be cited by giving the volume and page, for illustration, 1 A.D. 472 (1942). It is unnecessary to cite the docket or decision number. Prior to 1942 the Secretary's decisions were identified by docket and decision numbers, for example, D-578; S. 1150. Such citation of a case in these volumes generally indicates that the decision is not published in Agriculture Decisions.

Current court decisions involving the regulatory laws administered by the Department of Agriculture are published herein.

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In re: SEQUOIA ORANGE CO. INC., AMA Docket No. F&V 908-2. Decided January 15, 1986.

Decision by Donald A. Campbell, Judicial Officer.

REMAND ORDER

On January 7, 1986, Administrative Law Judge Victor W. Palmer certified to the Judicial Officer the question as to whether petitioner's counsel should not be permitted to participate in this proceeding because of his prior work and responsibilities as Assistant General Counsel in the Marketing Division, Office of the General Counsel, United States Department of Agriculture. Petitioner's counsel has this day withdrawn from the proceeding and, therefore, that issue is now moot. Accordingly, the case is remanded to the Administrative Law Judge for further proceedings.

In re: SEQUOIA ORANGE CO. INC., AMA Docket No. F&V 910-7. Decided February 13, 1986.

Gregory Cooper, for complainant.

James Mosely, Capital Legal Foundation, Washington, D.C., for respondent.

Decision by William J. Weber, Administrative Law Judge.

ORDER GRANTING MOTION TO DISMISS

The marketing of lemons grown in central and southern California, and Arizona, is controlled by a marketing order.¹

The purpose of a marketing agreement (or order) is to "establish and maintain such orderly marketing conditions as will establish and maintain parity prices for growers, while at the same time protecting the interests of consumers (7 USC § 602)." *In re Sequoia Orange Co., Inc., and Exeter Orange Co., Inc.*, 41 Agric. Dec. 1511, 1511-12 (1982).

The marketing order limits the quantity of lemons grown in the regulated area that may be "handled."²

The marketing order provides for a Committee (Lemon Administrative Committee) consisting of growers, handlers and a nonin-

¹ Lemons Grown in California and Arizona, 7 CFR 910; Agricultural Marketing Agreement Act of 1937, 7 USC 601.

² Simplistically, for purposes here, "handle" means to buy and/or ship regulated lemons for fresh market use in Canada or the United States. (7 CFR 910.6, 910.7)

Generally, lemons, grown in the regulated area, used by charitable institutions, relief agencies or processing manufacturers to make juice or some by-product are excluded from regulation (7 CFR 910.80).

dustry member to administer, implement, oversee, report and recommend to the Secretary on matters pertinent to the marketing of lemons from the regulated area (7 CFR 910.30, 910.31, 910.32, 910.33).

The Committee is a creature of, and for, the marketing order. It uses its collective expertise to carry out its duties and make recommendations to the Secretary. Its composition and structure is controlled by detailed provisions in the marketing order (7 CFR 910.20-910.33).

One of its functions is to annually compile a Marketing Policy covering pertinent information and recommendations for the following marketing year, including its recommendation concerning the quantity of lemons which the Committee deems advisable to be handled weekly during the following year (7 CFR 910.50, 910.51).

The Secretary may, based on that recommendation and the supporting data and rationale, and "from other available information," determine that limiting the quantity of lemons to be handled during any week will tend to carry out the declared policy of the Agricultural Marketing Agreement Act of 1937 (7 USC 601; "Act").

The Marketing Policy submitted by the Committee each year to the Secretary provides information concerning: (1) the supply, quality and sizes of lemons available in each district (within the marketing order), (2) estimates concerning the domestic, export, by-product and other uses of lemons, (3) a proposed schedule for weekly shipments to the fresh market in the United States and Canada, (4) the level and trend of consumer income, (5) estimates concerning competitive citrus commodities, and (6) any other pertinent information. Any revisions must cover similar updated information (7 CFR 910.50).

In making its decision to regulate lemons, the Committee must consider income trends, weather conditions, prices and other relevant factors. Changes may be recommended from time to time, as may be warranted (7 CFR 910.51).

Based upon this and any "other available information" (7 CFR 910.52), the Secretary may limit the quantity of lemons to be handled during any particular week(s).

The Petitioner is a handler regulated by this Lemon Marketing Order. Petitioner seeks an "order (a) declaring that the 1984-85 Marketing Policy and weekly prorate [base] are not in accordance exempting [Petitioner] Sequoia from the obligation [Marketing] Policy and weekly prorate." (Page

"handled" by a handler that week) and the total of all such lemons all handlers have had that time.³

The handler is then authorized to handle the percentage of the total quantity of lemons fixed by the Secretary to be handled that week. Thus, the weekly prorate base is a key figure in the computation of the handlers' weekly allotments⁴ for shipment of lemons for fresh use in the United States or Canada. *In re Sequoia Orange*, *supra*, at page 1513.

Petitioner challenges the 1984-85 Marketing Policy filed by the Lemon Administrative Committee and the weekly proration system from a variety of angles and levels:

- * Inability to participate in the formulation of the Marketing Policy (as prepared by the Committee) and the establishment of weekly prorate allotments.⁵
- * Arbitrary and capricious "rubber stamping" of the Marketing Policy by the Secretary, without independent scrutiny or consideration of alternatives or other evidence, etc., constitutes an abuse of discretion.
- * Conflicts between the Marketing Policy and USDA guidelines.
- * Failure of the Secretary to consider alternatives to the weekly proration system, to comply with requirements of the Regulatory Flexibility Act (5 USC § 601), Executive Order 12291 and the Secretary's Memorandum 1512-1 (issued June 11 1981 to implement Executive Order (12291).
- * Because supply controls violate due process, equal protection and the requirement for just compensation for deprivation of property rights, all as protected by the Fifth Amendment.

³ The weekly prorate base is "the ratio expressed in percentage terms, between the average weekly pick for each applicant handler and the total of such average weekly picks for all applicant handlers (7 CFR § 910.53(d), 1530c(2))." *In re Sequoia Orange*, *et al*, *supra*, at page 1513.

⁴ This allotment may be temporarily increased in several specified manners. *In re Sequoia Orange*, *supra*, at page 1513-14.

⁵ Essentially these are division titles paraphrased to make the apparent point to which the supporting material seems directed.

- * Because the Market Policy and the weekly proration system are contrary to the historical purpose(s) of the Agricultural Marketing Agreement Act, and violate it in five respects, and frustrate the Congressional intent.
- * Because the Market Policy impedes achievement of orderly marketing.
- * Because the Market Policy and the weekly proration system cause disorderly marketing.
- * Because the Market Policy fails to establish parity prices.
- * Because the Market Policy and weekly proration system are inequitable and discriminate against Petitioner.
- * Because the Market Policy creates/uses an illegal and unauthorized classified pricing scheme.
- * Because the weekly proration system fails to achieve parity prices, depresses grower income, is wasteful, distorts the marketing season, implements an illegal classified pricing scheme, contributes to inequities in grower income, fuels chronic overproduction, suppresses commercial initiatives, destroys the balance between supply and demand, fails to achieve the objectives of and frustrates the Agricultural Marketing Agreement Act, the Secretary has a mandatory duty to terminate the use of the weekly proration system and set aside the Market Policy.
- * Because the Market Policy and the weekly proration system take Petitioner's property without compensation and violate its substantive and procedural due process rights, and deny it equal protection, all as protected by the Fifth Amendment, the relief sought should be granted.

Each of these divisions is supported by a brief argument of a legal, economic, historical or philosophical character.

It is not feasible to require Respondent to answer these arguments as if they were pleadings of a factual nature or character.

Essentially, as illustrated by Petitioner's response to the Motion to Dismiss, Petitioner seems to be inviting counter-argument from Respondent.

An adversarial hearing is predicated on an ability to formulate a set of issues with certain dimensions and limits, so that rulings may properly be made on relevancy and materiality of proffered evidence.

With such broad ranging assertions which make up the Petition, there could not reasonably be effective control of the proceedings on questions of relevancy and materiality.

Somewhere, Petitioner could find and point to some word, phrase, sentence or paragraph, and argue with some merit that the evidence they wish to present, directly or indirectly, relates to an issue based on or related to that "allegation."

Blending generalized and vague contentions with a short generalized and conclusory argument, as done here, is a pandora's box.

Petitioner's Response to the Motion to Dismiss, is mainly directed to the merits of their position, rather than the pleadings that set forth their position.

A threshold issue here is the character of the Petition as a pleading, not the merit of Petitioner's position.

Respondent cannot be compelled to answer this Petition selectively admitting or denying "allegations." The risk is that Respondent would take a safe position, denying everything, and further frustrate formulation of an issue-structure on which to proceed.

Control of the proceedings cannot/should not be relinquished to Petitioner through the vague generalized contentions and arguments which constitute the Petition.

Further, "Petitioner cannot place upon others the responsibility to sort through [this 37 page] Petition to determine whether or not a set of allegations may be patched together . . ." *In re Sequoia Orange, supra*, at page 1518.

The Petitioner does not comply with 7 CFR 900.52(b) which requires a Petition to contain a:

- "(2) Reference to the specific terms or provisions of the order, or the interpretation or application thereof, which are complained of;
- (3) A full statement of the facts (avoiding a mere repetition of detailed evidence) upon which the petition is based, and which it is desired that the Secretary consider, setting forth clearly and concisely . . . the manner in which petitioner claims to be affected by the terms or provisions of the order, or the interpretation or application thereof, which are complained of;

- (4) A statement of the grounds on which the terms or provisions of the order, or the interpretation or application thereof, which are complained of, are challenged as not in accordance with law . . ."

In addition to the pleading difficulties, the Petition has other deficiencies of a legal character. Petitioner has distorted concepts of the law, procedure and facts, which cause confusion and ambiguity.

Respondent persuasively and ably covered them in the following extracts from its Memorandum of Points and Authorities in Support of Respondent's Motion to Dismiss:

"II. The Petition Fails To State A Sufficient Claim

In order to conform with the AMAA as required by the Rules of Practice (7 CFR 900.52(c)), it is endemic that a petition must state a claim upon which relief can be granted. Aside from the obvious facial infirmity of the petition, an analysis of the true nature of the petition and the relief sought reveals its substantive failure to state such a claim.

The petition claims to seek relief from the 1984-85 marketing policy (7 CFR 910.50) and the weekly prorate regulations issued pursuant to 7 CFR 910.52. The marketing policy, which was issued July 10, 1984 (see, Exhibit to petition), and the prorate regulations apply to a fiscal year which began on August 1, 1984, and will end on July 31, 1985 (7 CFR 910.10). Yet, petitioner did not file its overly long petition until the end of April 1985. The petitioner, and its attorney, should be extremely familiar with the Department's applicable rules of practice from their numerous other petitions. It is inconceivable that petitioner could have anticipated relief before the end of the fiscal year to which the complained of documents are applicable. If this were truly the case, the Administrative Law Judge might just as well dismiss the petition at this point for mootness.

The petition, however, is really not attacking this marketing policy document or these particular weekly prorate regulations. Indeed, throughout its 37 pages it fails to object to any facts and figures of these specific documents. Rather, the petition is a backdoor approach to attacking the Lemon Order provisions that authorize these documents. The objections would be just as applicable to next year's or last year's marketing policy and prorate regulations as they would be to this year's. The method of petitioner's attack is to allege that a conglomeration of statutes, orders, guidelines, etc. cause the Lemon Order provisions to be unlawful. As will be demonstrated below, each of these grounds is legally defective and, thus, the petition fails to state a claim upon which relief could

be granted under 7 U.S.C. 608c(15)(A) and the petition should be dismissed.

Before considering the specific allegations, one must differentiate between the marketing policy and the weekly prorate regulations. Under section 910.50 of the Lemon Order, near the beginning of the fiscal year the Lemon Administrative Committee (hereinafter LAC) meets and prepares a marketing policy containing various information specified in said section. If substantial modifications become advisable during the fiscal year, the LAC may meet and prepare a revised marketing policy. The marketing policy is derived from these LAC meetings and is submitted to the Secretary. The marketing policy is a document which contains a compilation of factual data concerning lemons and the collective expertise of the industry as to the current economic situation, the forecast for the coming year, the recommended actions to be taken during the year, and a general schedule as to when particular actions should be taken. Under the Lemon Order, the marketing policy imposes no restrictions, limitations or obligations on anybody. In the hands of the Secretary, it is an evidentiary document of information and advice which can be weighed and considered along with all other available information and advice in reaching any determinations the Secretary might make. Since the marketing policy cannot affect or impose an obligation on petitioner under the Lemon Order it is not a proper subject of a petition under 7 U.S.C. 608c(15)(A) or section 900.52(b)(3) of the Rules of Practice and, thus, any allegations in the petition concerning the marketing policy must ultimately be unavailing of relief and should be dismissed.

The weekly prorate regulations, on the other hand, do impose obligations on the petitioner and all other handlers in the industry. During the year, the LAC investigates the supply and demand conditions on a weekly basis and considers certain specified factors (7 CFR 910.51). If the LAC believes handling restrictions are advisable for any week, it makes certain recommendations to the Secretary (7 CFR 910.51). Based on the LAC information and recommendations and all other available information, the Secretary determines whether a limitation is necessary and the amount of such limitation (7 CFR 910.52). It is this determination by the Secretary, effectuated through informal rulemaking in the Federal Register, that imposes legally enforceable obligations on the handlers. The subdivision of this industry-wide limitation to each particular handler is a ministerial act done by the LAC on the basis of formula contained in the Lemon Order, and subject to certain flexibility options which may be exercised by each handler (7 CFR 910.53-910.63). Therefore, the weekly prorate regulations promulgated in

the Federal Register by the Secretary are the proper subject of a 7 U.S.C. 608c(15XA) proceeding. The grounds alleged by petitioner in this proceeding, however, fail to comply with the AMAA in that they fail to state a claim upon which the prorate regulations could be invalidated and the relief requested could be granted.

The remainder of this memorandum will discuss the infirmity of each of the particular grounds alleged by petitioner.

A. The Administrative Procedure Act

The AMAA specifically authorizes volume control provisions for marketing orders such as are incorporated in the lemon order. (7 U.S.C. § 608c(6)). A marketing order containing such provisions must be promulgated after notice and public hearing when the Secretary finds "upon the evidence introduced at such hearing" that the issuance of such an order will tend to effectuate the declared policy of the Act. (7 U.S.C. §§ 602, 608c(3), (4), (6)). The lemon order, containing a provision for the imposition of weekly controls on the quantity of lemons which may be handled, was promulgated in 1941 after notice and hearing. 6 Fed. Reg. 1833 (1941). The order including its weekly volume control provision has undergone numerous amendment proceedings since 1941, all of which were effectuated upon notice and hearing on the record as required by the Act. 7 U.S.C. § 608c(17); See, e.g., 12 Fed. Reg. 6620 (1947), 12 Fed. Reg. 7904 (1947), 13 Fed. Reg. 766 (1948); 19 Fed. Reg. 5819 (1954), 19 Fed. Reg. 5969 (1954), 19 Fed. Reg. 7175 (1954); 20 Fed. Reg. 6191 (1955), 20 Fed. Reg. 7137 (1955), 20 Fed. Reg. 8461; 27 Fed. Reg. 4994 (1962), 27 Fed. Reg. 6629 (1962), 27 Fed. Reg. 8346 (1962); 35 Fed. Reg. 16,850 (1970), 36 Fed. Reg. 5609 (1971); 36 Fed. Reg. 9061 (1971).

Petitioner's repeated complaints about "the marketing policy" and "weekly prorate", when viewed as a whole, comprise a complaint about any use of volume controls on the lemon market by the government as authorized by the AMAA and the Lemon Order. However, to the extent that petitioner's allegations concerning the "marketing policy" and "weekly prorate" attack the procedural validity of the means used to implement the market volume control provisions of the lemon order, such allegations are without merit.

Petitioner's allegations that the LAC's annual marketing policy formulated pursuant to the lemon order, 7 CFR § 910.50, is in violation of the APA should be dismissed, because the LAC's marketing policy is not subject to APA rulemaking or review provisions. The APA provisions on publication in the Federal Register and on an opportunity for public comment only apply to rulemaking. (5 U.S.C. § 553). A rule is defined in pertinent part as "an agency statement

of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy" (5 U.S.C. § 551(4)). Certain rulemaking is specifically exempted from the notice and comment requirements of the APA. Among such exempt actions are "general statements of policy." (5 U.S.C. § 553(b)(A)).

The LAC's marketing policy is merely a collection of data and recommendations by an industry panel acting in this respect as an advisor to the agency, which latter body alone retains the power to impose any market volume controls under the lemon order. (7 CFR § 910.52). The LAC's marketing policy is not agency policy and has absolutely no effect on anyone without the crucial later event of agency action which is taken upon consideration of the LAC policy as well as other available information and advice from the LAC and other sources. The LAC's marketing policy statement does not impose market volume controls and has no direct impact whatsoever on the industry.

The merely advisory, non-binding nature of the LAC's marketing policy differentiates it from an agency statement implementing law with particular future effect as a rule is defined in the APA. However, even if the LAC's advisory marketing policy is seen as agency action within the meaning of the APA definition of a rule, the policy surely comes within the realm of a general statement of policy exempt from the notice and comment provision of the APA. (5 U.S.C. § 553(b)(A)). A general statement of policy is defined by the fact that it does not fix rights or impose obligations and does not have a substantial, direct impact on those regulated. *Aiken v. Obledo*, 442 F. Supp. 628, 653 (E.D. Ca. 1977). A general statement of policy does not establish a binding norm and is not finally determinative of the issues or rights to which it is addressed, because it leaves the agency still free to exercise informed discretion. *Guardian Federal S & L v. Federal S & L Ins. Corp.*, 589 F. 2d 658, 666 (D.C. Cir. 1978). The LAC marketing policy clearly fits this definition.

Moreover, the APA only subjects final agency action to judicial review. (5 U.S.C. § 704). Even if the LAC marketing policy is agency action, which is dubitable as discussed above, it is certainly not final agency action within the meaning of the APA. (5 U.S.C. § 704). Agency actions are not final and reviewable "unless and until they impose an obligation, deny a right, or fix some legal relationship" *Chicago & Southern Air Lines Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 112-113 . . . (1948); *Nevada Airlines Inc. v. Bond*, 622 F. 2d 1017, 1020 n. 5 (9th Cir. 1980). *Air California v. United States Dept. of Transp.*, 654 F.2d 616, 621 (9th Cir. 1981). Where an agency pronouncement does not have the status of

law but requires some intervening action before the complaining party feels any effect, the action is not final for purposes of review. *Air California, supra*. As the United States Supreme Court noted in *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 242 (1980), a critical factor in determining whether an action is final is whether it has legal force, as, for instance, does a regulation with which parties are expected to comply immediately or risk penalties of law. In the present case the LAC's marketing policy has no force of law whatsoever, has no direct impact on the industry as it is merely an intermediate, informational and advisory step in the regulatory process, no one is expected to comply with it and it fixes no obligation on anyone. The policy is, therefore, not final agency action subject to judicial review under the APA.

With respect to the Secretary's actual exercise of his discretion and power to impose market volume controls under the lemon order, 7 CFR § 910.52, petitioner alleges that the weekly volume control regulations have been issued without public notice and comment procedures in contravention of the requirements of the APA. The weekly volume limitation regulations do not, in fact, provide for public comment on where the volume level is set for any week, because fluctuating weekly regulation does not allow time for a comment period or for thirty day advance publication before the effective date. This is in accordance with the APA's specific exceptions to the usual public comment and advance publication procedures. (5 U.S.C. § 553(b)(B), (d)). When volume controls are to be effected under the lemon order, the order itself requires that such controls be implemented on a weekly basis. (7 CFR § 910.52). The requirement of weekly volume regulations was included in the lemon order only after notice to the public, a hearing and other public participation procedures were afforded. 6 Fed. Reg. 1833 (1941). The lemon order has also been amended over ten times since it was promulgated, and each time the public was afforded a hearing and the opportunity to participate in the formal rulemaking process as required by the APA. Despite the fact that weekly volume regulation necessarily prevents public participation in where the level is set each week, the public has had the opportunity and is currently being afforded the opportunity to be heard on the issue of the lemon order's provision for volume regulation and its requirement of weekly regulations when volume controls are put into effect.

The lemon order requires that limits on the handling of lemons be evaluated and effected on a weekly basis, because the supply and demand conditions of the lemon market are variable. The long period during which lemons can be harvested throughout the year

subjects the supply to unpredictable variations due to weather and other variables which can only be monitored and accurately predicted a relatively short time in advance of the actual harvesting. See, e.g., 35 Fed. Reg. 16,850; 16,853; 16,855; 16,856 (1970). Data on supply and demand are compiled and considered by the LAC at a public meeting prior to the particular week under consideration. The LAC's data and recommendations which are then sent to the Secretary are, thus, received by the Secretary shortly before the period during which any regulation would take effect. Public comment and 30 day advance publication under APA procedures are totally impracticable at that time and would be contrary to the economic interest of the public in an orderly, regulated flow of commodities to market. See, e.g., 48 Fed. Reg. 19,356-57 (1983). Reacting to variable, constantly fluctuating market conditions in a timely manner to effect orderly marketing of lemons necessarily prevents the Secretary from giving the public advance notice and an opportunity to comment before the week during which any particular limit is to be in effect. The APA recognizes this type of situation in section 553 where it exempts from notice and comment requirements those actions where "the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are *impracticable, unnecessary, or contrary to the public interest*". (5 U.S.C. § 553(b)(3)). The APA also allows less than thirty days advance publication of a rule before its effective date for good cause found and published with the rule. (5 U.S.C. § 553(d)(3)).

Weekly regulation implementing the existing market volume control provision of the lemon order serves a valid economic regulatory purpose. It is not merely an excuse to avoid public participation in the regulatory process. Weekly implementation of market volume controls is clearly a situation where advance notice, public comment and 30 day advance publication are totally impracticable and contrary to the public interest in the orderly marketing of lemons throughout its year long harvest season. This case is a valid use of the APA exemption quite unlike those situations in which courts have found use of the exemption to be improper. This is not a case where no reasons for claiming the exemption were published with the rule as in *Buschmann v. Schweiker*, 676 F. 2d 356, 357 (9th Cir. 1982), or *Kelly v. United States Department of Interior*, 339 F. Supp. 1095, 1101 (E.D. Ca. 1972). Nor is this a case where unexplained delay existed prior to the agency claiming that there was no time to follow APA notice and comment procedures as in *Kelly v. United States Department of Interior*, *supra*. Nor is this a case where a statutory deadline for regulation was used as an excuse for

avoiding public procedures when the agency could have met the deadline even providing for notice and comment as in *Western Oil & Gas v. United States E.P.A.*, 633 F.2d 803 (9th Cir. 1980).

Most importantly this case is not a case like most situations in which courts have narrowly construed section 553(b)(B) where notice and opportunity for comment is the only possible opportunity for public participation in the governmental process before the public is subject to a regulation. Unlike such cases the use of the section 553(b)(B) exemption here does not run counter to the purpose of the APA which is to give the public the chance to exercise a right to air their views to the government to insure better government decision making and greater governmental responsiveness to the needs of the public. *Buschmann v. Schweiker*, *supra* at 357; *Kelly v. United States Department of Interior*, *supra*, at 1102. In the present case the use of the section 553(b)(B) exemption for the weekly regulations implementing the volume control provisions of the lemon order has not eliminated the opportunity to the public to be heard in a meaningful exchange of views with the government on the subject of whether the lemon market should be subject to weekly volume controls. The formal rulemaking procedures used in initiating and amending the lemon order have assured the public of numerous opportunities to be heard on the issue over the years. In fact, such an opportunity is currently being afforded in the pending rulemaking proceeding. This fact is important in any evaluation of petitioner's claims that weekly regulations are improperly issued under the APA, because nowhere in the petition is it claimed that a particular weekly limit was incorrect or set at an inappropriate level and that petitioner was deprived of the opportunity to so inform the agency. Petitioner's real complaint is not where the level of the control is set but rather on the use of any controls at all. However, the use of the section 553(b)(B) exemption for weekly regulations has not deprived them of an opportunity to be heard on this issue. Therefore, the use of the section 553(b)(B)

§§ 601, 602(4)). Petitioner disagrees with this Congressional policy and advocate a free market economy. Petitioner is attempting to interfere in this legislative policy question of the advisability of a free market when Congress has long since decided that a free market is not advisable for certain segments of the agricultural economy. Petitioner's attempt to undercut this legislative policy decision is disguised as an attack on the use of the section 553(b)(B) and (d) exemptions of the APA. However, such weekly procedures are peripheral to petitioner's major complaint that the lemon order allows for market volume to be controlled at all. This disguised attempt at judicial legislation through a request for review of agency use of APA exemptions should be recognized and rejected. The United States Supreme Court has looked very unfavorably upon this type of piecayune attack on substantive administrative decisions and had said that "[a]dministrative decisions should be set aside . . . only for substantial procedural . . . reasons . . ." *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978).

In the present case the public has been given the opportunity to be heard and, indeed, is currently being heard on the issue of whether market volume controls for lemons are appropriate under existing market conditions to fulfill the purposes of the Act. The administrative decision to control the market was incorporated in the order only after public hearing and full public participation. Furthermore, full public participation is allowed at the weekly LAC meeting where the weekly volume recommendations to the Secretary are determined. Weekly implementation of this order provision is in accordance with the APA, because it would be impracticable and contrary to the economic interest of the public to achieve the necessary short term regulation of the market with the use of notice and comment and 30 day advance publication procedures. Therefore, the market volume control provisions of the lemon order have been properly implemented, and the petition fails to state a cause of action upon which relief can be granted.

B. USDA Guidelines

Petitioner alleges that the marketing policy and prorate regulations do not conform to the Guidelines For Fruit, Vegetable and Specialty Crop Marketing Orders of January 25, 1982 (attachment 1 to this Memorandum) and the Secretary's letter of May 10, 1983 (attachment 2 to this Memorandum). While respondent certainly denies these allegations, conformity or nonconformity to these documents does not give rise to a cause of action upon which relief can be granted in this proceeding.

The Guidelines and letter are clearly general policy documents outlining the direction the Secretary would like to follow in the future. Unlike the AMAA or the Lemon Order they are not in any sense a law with which informal rulemaking actions must conform. Under 7 U.S.C. 608c(15)(A) relief may be granted only if the Secretary's actions are found to be "not in accordance with law." Such a finding regarding the marketing policy and prorate regulations cannot be made, therefore, on the basis of adherence or non-adherence to the Guidelines or the letter of May 10, 1983.

C. The Regulatory Flexibility Act

Section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. §§ 601-612 (hereinafter RFA) provides that sections 603 and 604 of the RFA, which mandate initial and final regulatory flexibility analyses during certain rulemaking actions, shall not apply to any rule for which the agency certifies that it will not have a significant economic impact on a substantial number of small entities. (5 U.S.C. § 605(b)). Such certifications were made in the present case with respect to the imposition of weekly volume controls on the handling of lemons under the lemon order. Nevertheless, petitioner alleges that the certifications under section 605(b) were improper and that under sections 603 and 604 regulatory flexibility analyses should have been prepared. However, under the RFA when a section 605 certification is made it automatically bypasses sections 603 and 604 and obviates any need for any regulatory flexibility analyses to be prepared or published. (5 U.S.C. § 605(b)). Petitioner's allegations that such regulatory flexibility analyses were required must fail in light of the certifications which were duly made.

There is also no jurisdiction to review the Secretary's decision that section 605(b), rather than sections 603 and 604, of the RFA is applicable to the imposition of volume controls on the handling of

the whole record of agency action in connection with the review.

5 U.S.C. § 611. Clearly, the plain language of the RFA indicates that the respondent's compliance or noncompliance with sections 603-605 is not a proper subject for review in this forum.

In addition to the plain meaning of section 611 of the RFA barring judicial review, there is ample evidence in the legislative history of the RFA which manifests a Congressional intent to foreclose completely any judicial review of matters related to agency compliance with the RFA. The following explanation appears in the section-by-section analysis of the bill which later became the RFA:

Section 611(a) provides that there is no judicial review of any determination by an agency regarding the applicability of any provision of this subchapter except as provided in section 611(b). This means, for example, that the decision by an agency with respect to what proposed rules would have a significant economic impact on a substantial number of small entities pursuant to section 605(b) shall not be subject to judicial review. Thus, the decision regarding when the agency shall conduct a regulatory flexibility analysis remains in the sole discretion of the agency. Also not subject to judicial review are agency determinations regarding the agenda (section 602), the procedures for gathering comments (section 609), the periodic review of rules (section 610) and any other administrative determination under this act.

Section 611(b) provides that a regulatory flexibility analysis is a management tool and administrative procedure to effect improved rulemaking. Neither the manner of conducting regulatory flexibility analyses nor the content of the analyses should be subject to judicial review either pursuant to this act or pursuant to section 706(2)(D) of title 5, United States Code, or pursuant to any other provision of law. But once a regulatory analysis has been prepared, its contents may, if relevant, be considered by the reviewing court along with other relevant material in determining the validity of the rule which is the subject of the analysis.

The court will look to the statement of the basis and purpose published by the agency along with its final rule to determine whether the rule is valid. In making that deter-

mination, the court may consider the contents of the regulatory flexibility analysis along with any other relevant material.

126 Cong. Rec. 21460-21461 (1980). Thus, in an instance such as this one where the agency has certified that no regulatory flexibility analysis is required, section 611 does not allow a court to review that decision.

Since the propriety of the agency's RFA certification is not reviewable, it cannot be the basis for a finding that the prorated regulations are "not in accordance with law." Hence, these allegations in the petition fail to state a claim upon which relief can be granted by this forum or any reviewing district court under section 8c(15) of the AMAA.

D. Executive Order 12,291

Executive Order 12,291 is a presidential directive to agency rule-makers to conduct cost-benefit, regulatory impact, and regulatory review analyses in the process of making rules likely to have significant impact on the economy as defined in the executive order. The goal of Executive Order 12,291 is "to reduce the burdens of existing and future regulations, increase agency accountability for regulatory actions, provide for presidential oversight of the regulatory process, minimize duplication and conflict of regulations and insure well-reasoned regulations." Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981), *reprinted in* 5 U.S.C. § 601 app. Executive Order 12,291 does not apply to rulemaking under the hearing procedures of section 556 of the APA. Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981), *reprinted in* 5 U.S.C. § 601 app. It does apply to other types of promulgation of "major rules", i.e. those with significant economic impact as defined by the executive order. *Id.* Petitioner contests the respondent's determination that Executive Order 12,291 did not apply to the imposition of volume controls on the handling of lemons under the lemon order. There is no jurisdiction to review this matter.

Executive Order No. 12,291, 46 Fed. Reg. 13,193, 13,198 (1981), *reprinted in* 5 U.S.C. § 601 app. provides the following with respect to judicial review: "This Order is intended only to improve the internal management of the Federal government, and it is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers or any person." With such language in the executive order, it is evident that the President intended to preclude suits instituted to enforce agency compliance with Executive Order No. 12,291.

Executive Order No. 12,291 is, thus, an administrative document within the executive branch of government rather than a delegated legislative action by the President. Therefore, it does not have the force and effect of law. As the Court of Appeals for the District of Columbia Circuit has noted: "Congress has given the District Court many important functions to perform, but they do not include policing the faithful execution of Presidential policies by Presidential appointees." *Manhattan-Bronx Postal Union v. Gronowski*, 350 F. 2d 451, 457 (D.C. Cir. 1965), cert. denied, 382 U.S. 978 (1966).

Since failure to comply with Executive Order No. 12,291 cannot be the basis for a finding that the prorate regulations are "not in accordance with law", these allegations in the petition fail to state a claim upon which relief can be granted by this forum or any reviewing district court under section 8(c)(15) of the AMAA.

E. Secretary's Memorandum 1512-1

Secretary's Memorandum 1512-1 is merely this Department's internal administrative document for implementing Executive Order No. 12,291. Just as the President by his Executive Order did not create a law which could invalidate the marketing policy and prorate regulations, so too the Secretary's implementing memorandum did not have such an effect. Thus, these allegations also fail to state a cause of action upon which relief can be granted.

F. The Philosophical Issues

The petition in this proceeding contains a rambling discourse of approximately ten pages that appears to be more related to second rate philosophy than any intelligible legal argument. Basically words and phrases are extracted out of context from those portions of the AMAA that state its general purposes (7 U.S.C. 601 and 602). These in turn are followed by attacks generally aimed at any type of volume regulations and by assertions of one or two alleged facts that intrinsically "prove" that volume regulations are the sole cause that the general purpose has not been totally achieved.

In the AMAA Congress stated certain general purposes and goals and gave the Secretary authority to promulgate marketing orders with specified provisions. On numerous occasions, as was noted above, the Secretary conducted formal rulemaking hearings to gather the best evidence on whether a marketing order was required and which of the specified provisions should be in such an order. If the industry concurred with the Secretary's evaluation, the marketing order took effect. The provisions in 7 U.S.C. 608(c)(15)(A) were created so handlers could voice objections that the marketing order provisions did not conform to the evidence at the

rulemaking hearing, violated the specific authorities in the AMAA or violated some other statute, or that regulations or obligations under the marketing order were similarly violative.

In this portion of the petition, the attack is not on any specific prorate regulation or portion of the current marketing policy. Rather it is on the marketing order provisions that authorize these documents. These attacks are not based on allegations that the lemon order provisions aren't specifically authorized under 7 U.S.C. 608c(6) or (7), or that they violate some other statute. Petitioner doesn't even claim the marketing order provisions aren't based on the rulemaking records that created them. Rather these attacks are an infantile plaint that the marketing order hasn't fully achieved all the goals and purposes of Congress and made Sequoia's world a happy place. Such attacks have no bearing on whether the marketing order provisions are "in accordance with law" and, hence, are not a cause of action upon which relief can be granted in a proceeding under 7 U.S.C. 608c(15)(A).

Such attacks are also misleading in that they fail to note that a formal rulemaking proceeding is in progress and that petitioner has fully participated at every step of the proceeding in presenting its economic and philosophic views as to the future of the lemon order.

G. Classified Pricing

The portion of the petition dealing with classified pricing contains the same fallacious reasoning evident in the immediately preceding sections. Petitioner correctly states that the Lemon Order limits the quantity of lemons that may be handled for fresh use and does not limit the number of lemons that may be handled for by-product use. If lemon production is far in excess of all the needs of the market, one would logically expect such Lemon Order limitations would cause the marketplace to attach a higher price to lemons for fresh use than to lemons for byproduct use. Petitioner next asserts that such a price differential has occurred. Under the petition's twisted logic, the fact that this end has occurred (i.e.: a price differential) means that the Lemon Order has fixed prices and, hence, is illegal since the AMAA only allows price fixing for milk.

There are only three legitimate questions to be asked in a proceeding under 7 U.S.C. 608c(15). The first is whether the AMAA provides authority for a marketing order limiting the handling of lemons for fresh use. Under 7 U.S.C. 608c(2) and (6) such a marketing order is clearly authorized. The second question is whether the marketing order was promulgated in a procedurally correct

manner and was supported by substantial evidence in the formal rulemaking record. Petitioner does not even allege any deficiencies in this regard. The final question is whether the weekly limitation on the handling of fresh lemons is being accomplished in a procedurally correct manner and in accord with the relevant provision of the marketing order. Again, petitioner cannot make any legitimate objections. Hence, the Lemon Order limitation on the handling of fresh lemons is "in accordance with law" and the petitioner's challenge must fail.

Whether the limitation of the handling of fresh lemons promotes a societal goal and whether that goal could better be accomplished through free enterprise or through the use of some other AMAA authorized provisions are all questions that may be explored in a formal rulemaking hearing under 7 U.S.C. 608c(3), (4), and (17). However, the fact that such economic and philosophic questions may exist does not render the current lemon order and its provisions "not in accordance with law" and subject to relief in this forum. Hence, petitioner has again failed to state a cause of action upon which relief can be granted.

H. Termination

Petitioner correctly states that 7 U.S.C. 608c(16)(A) provides that the Secretary shall terminate an order (or a provision of an order) when he finds it does not effectuate the purposes of the AMAA. However, the Secretary has made no such finding and the petitioner has not even alleged that such a finding has been made. Hence, the Lemon Order is not susceptible to attack in this forum as "not in accordance with law."

It might be noted that the question of termination or continuance or modification of prorate is presently before the Secretary in the above-cited formal rulemaking proceeding. If prorate is continued or modified, then petitioner can file a petition under 7 U.S.C. 608c(15)(A) to challenge such a conclusion if petitioner does not believe it to be supported by substantial evidence in the rulemaking record.

I. Constitutional Issues

Petitioner claims that the use of market volume controls in the lemon order deprives it of liberty and property without due process of law, takes its property without just compensation, and denies it equal protection vis a vis other lemon handlers, all in alleged violation of the fifth amendment to the Constitution; and denies it freedom of association in violation of the first amendment to the Con-

stitution. Courts have long since held, however, that the AMAA and resultant marketing orders are constitutional.

1. The Use Of Market Volume Controls Through The Lemon Order Is Within The Constitutional Power Of Congress To Regulate Commerce.

Well over forty years ago the Supreme Court held that it is within the power of Congress under the commerce clause of the Constitution to prohibit absolutely all interstate commerce. *Mulford v. Smith*, 307 U.S. 38,48 (1939), citing *Curran v. Wallace*, 306 U.S. 1 (1939). Therefore, the Court held in *Mulford v. Smith* that Congress could limit the amount of a given commodity which may be transported in such commerce and that Congress' motive in exerting that power was irrelevant to its legitimacy. Consequently, the Court upheld the Secretary's issuance of a marketing quota on tobacco under the authority of the Agricultural Adjustment Act of 1938, a precursor of the Act under consideration herein, as both a legitimate exercise of the commerce power and a constitutional delegation of such power to the Secretary. *Mulford v. Smith*, *supra*.

In *United States v. Rock Royal Co-op*, 307 U.S. 533, 569-76 (1939) and *H.P. Hood & Sons v. United States*, 307 U.S. 588, 594-95 (1939) the Supreme Court rejected arguments that the Agricultural Marketing Agreement Act of 1937, was an invalid exercise of Congress' power to regulate commerce and that the Act involved unconstitutional delegations of legislative power to the Secretary. The Court noted in *Rock Royal Co-op*, 307 U.S. at 569, that Congress' "power over commerce where it exists is complete and perfect." The Court also later found that by the Act Congress intended to exercise the full reach of that power, that the power to regulate interstate commerce implied every other power necessary to make such regulation effective, and reaffirmed the Act's constitutionality. *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 118-19, 123-25 (1942).

Even before the Supreme Court had reached its conclusions that the Act was constitutional, the Court of Appeals for the Ninth Circuit had so concluded. In *Edwards v. United States*, 91 F.2d 767, 780-83 (9th Cir. 1937), the court found that a marketing order which provided for weekly limitations on the quantity of California and Arizona oranges which could be shipped in commerce and which allowed an industry advisory committee to allot such limitation among handlers was a constitutional exercise of the commerce power. Accord, *Wallace v. Hudson-Duncan & Co.*, 98 F. 2d (9th Cir. 1938).

2. The Imposition Of Market Volume Controls Does Not Deprive Petitioner Of Liberty Or Property Without Due Process Within The Meaning Of The Fifth Amendment To The Constitution.

Petitioner alleges that it has been deprived of liberty and property without due process, because the imposition of controls on the number of lemons which may be marketed interferes with, *inter alia*, its right to contract freely and to receive the maximum possible compensation for the sale of lemons. These arguments have also been rejected by courts long ago. Interference with the liberty and property rights inherent in the ability to contract freely was rejected by the Supreme Court in *Rock Royal Co-op*, *supra* at 549, 572, as a basis for finding a milk marketing order in violation of the Constitution. The Court found that the provisions of the marketing order were nonetheless reasonably related to the power to regulate commerce which the Court had found "complete and perfect." *Id.*, see also, *H.P. Hood & Sons v. United States*, *supra* at 594-95 (a milk marketing order provision requiring handler payments for milk to be channeled through a regulatory equalization fund did not violate the due process clause of the fifth amendment to the Constitution).

With respect to a marketing order for oranges which set up volume controls and handler allotments in a manner virtually identical to the lemon order at issue herein, the Court of Appeals for the Ninth Circuit in 1937 rejected contentions that such volume controls were contrary to the fifth amendment's provisions for liberty of contract. *Edwards v. United States*, *supra* at 783-85. That court later elaborated on its reasoning in another case in which it upheld the constitutionality of a walnut marketing order despite the fact that it might be said to have destroyed property rights or the liberty to contract or engage in business freely. *Wallace v. Hudson-Duncan & Co.*, *supra* 991-93. In *Wallace v. Hudson-Duncan & Co.* the court found that the marketing order did not violate the fifth amendment, because the means adopted by the Secretary, i.e., the marketing order, were reasonably related to the declared object of the Act. *Id.* at 992. In judging that relationship the court noted that such a rational relationship would be presumed unless there were evidence to the contrary. *Id.* In *Whittenburg v. United States*, 100 F. 2d 520 (5th Cir. 1938), the Court of Appeals for the Fifth Circuit upheld the constitutionality of a grapefruit marketing order which limited the volume through weekly limits and handler allotments and prorations just as the lemon order does herein. In *Whittenburg* the Court noted that "collisions between private right [liberty of contract] and exertions of police power for the public good result generally in the prevalence of the public good." *Id.* at 523.

The court therein also pointed out that before any interference in property rights occurred through the imposition of volume controls under a marketing order, the Act required notice and a hearing for those to be affected and provided for judicial review of the Secretary's order promulgating a volume control regulation in a marketing order. *Id.* As proper hearing procedures had been accorded, the court found that liberty and property had not been taken without due process of law.

Petitioner in the present proceeding claims that the lemon order causes it to incur financial losses which it would not incur were such regulation absent, and that the lemon order does not meet the rational relationship test of constitutionality because it does not fulfill the purposes of the AMAA. Petitioner claims that it is respondent's burden to demonstrate the rational relationship. However, as the Court of Appeals for the Ninth Circuit noted in *Wallace v. Hudson-Duncan & Co., supra* at 992, it is petitioner's burden to overcome a presumption of a rational basis for the marketing order. The AMAA allows the Secretary to impose market volume controls for lemons when he finds from evidence introduced at the required hearing that such regulation will fulfill the purposes of the Act. 7 U.S.C. § 608c(3), (4), (6). That is precisely what happened here. 6 Fed. Reg. 1833 (1941). Judicial review of whether such regulation does tend to fulfill the purposes of the Act and as such is reasonably related to achieving legitimate goals is limited to a determination of whether the Secretary's decision that the regulation would promote the purposes of the Act was supported by substantial evidence introduced at the rulemaking hearing required by the Act prior to the issuance of a marketing order. 5 U.S.C. § 706(2)(E); see *Chiglaides Farm Ltd. v. Butz*, 485 F. 2d 1125, 1129 (5th Cir. 1973). Petitioner has failed to allege that the regulation is not supported by substantial evidence introduced at the rulemaking hearing. Thus, it can not possibly overcome the presumption that the regulation is rationally related to the goals of the Act, and this forum must dismiss the allegations that the lemon order is unconstitutional because it does not effectuate the goals of the Act. As there is not even a single allegation that the Secretary did not follow procedures prescribed under the Act in enacting the lemon order or that the Secretary's initial decision that the lemon order's volume control provisions would effectuate the Act is not supported by substantial evidence, the petition fails to state a claim upon which relief can be granted. Furthermore, the issue of whether the volume control provisions are still effectuating the AMAA is being reviewed by the Secretary in the current rulemaking proceeding. That issue may only be reviewed, if the Secretary's decision is un-

favorable to petitioner, on the basis of evidence of record in that proceeding.

3. The Imposition Of Market Volume Controls Do Not Constitute A Taking Of Private Property Within The Meaning Of The Fifth Amendment To The Constitution.

Petitioner maintains that economic losses which it allegedly suffers as a result of the imposition of volume controls under the lemon order constitute the taking of private property in violation of the fifth amendment. This issue was considered by courts long ago and such contentions were rejected. In 1939 in *Mulford v. Smith*, *supra* at 49-51, the Supreme Court held that despite cash investments by tobacco growers in crops they could not market that year due to the imposition of tobacco allotments among farmers, the financial losses did not constitute a taking of such farmers' property in violation of the fifth amendment. The Court of Appeals for the Ninth Circuit held in 1938 that even if a marketing order materially reduced a person's property rights or destroyed a person's property in the exercise of the commerce power, there is no "taking" within the meaning of the fifth amendment, because there is no direct appropriation of property from such person by the government. *Wallace v. Hudson-Duncan & Co*, *supra* at 989-91, citing *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923). A pertinent dictum the court of appeals also noted that even if the economic losses were a "taking" it would be justified by a public purpose with compensatory benefits to farmers of higher prices for their products. 98 F. 2d at 991. A recent marketing order case dealing with the issue of whether a taking was presented by government price regulation under a marketing order followed the precedent and reasoning of *Wallace v. Hudson-Duncan & Co*, *supra*. *United Fruit Bargaining Ass'n v. Butz*, 444 F. Supp. 785, 793 (N.D.Ca 1975).

In light of the above decisions, petitioner's alleged economic losses from the operation of the lemon order do not constitute a taking of its property without just compensation within the meaning of the fifth amendment.

The Lemon Marketing Order Does Not Discriminate Against Any Group Of Handlers In Violation Of The Due Process Clause Of The Fifth Amendment To The Constitution.

Petitioner alleges that under the lemon marketing order, it is allowed to ship fewer lemons than handlers with growers in other geographic districts under the order and handlers with growers in entirely unregulated areas and that volume controls discriminate among handlers in different production districts on the basis of

sales opportunities, income, and prorated limitations. Petitioner alleges by implication that the lemon marketing order dictates different prices for handlers with growers in different geographic districts. Petitioner claims that these discriminations among some handlers violate its rights under the fifth amendment to the Constitution.

The fifth amendment's guarantee of due process includes the concept of equal justice under law. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976). Equal protection analysis under the fifth amendment is the same type as has been developed under the equal protection clause of the fourteenth amendment. *Buckley v. Valeo*, 424 U.S. 1, 98 (1976). This analysis only entails a limited judicial review of legislative classifications of persons for different treatment under the law to determine if such classifications are rationally related to a legitimate governmental objective. *Schechter v. Wilson*, 450 U.S. 221, 230 (1981). The rational relationship analysis has been used previously by the Supreme Court to uphold distinctions made between handlers under the Act. *United States v. Rock Royal Co-op*, 307 U.S. 533, 564-65 (1939).

The AMAA provides for the method incorporated in the lemon marketing order of limiting the quantity of a commodity handled and apportioning that quantity equitably among all handlers. 7 U.S.C. § 608c(6). Such commodity volume regulation as will further the interests of farmers and consumers and will provide for orderly marketing has been found to be a valid governmental goal within the power of Congress under the commerce clause of the Constitution. Under the lemon marketing order the equitable apportionment among all handlers of the total quantity of lemons which may be allowed to be handled during any week is achieved through the prorated base system. The differentiation in calculating the prorated base among different geographic areas is based on the differences among these areas in production and marketing conditions. 7 CFR § 910.53(e). The lemon marketing order also allows for exceptions to this geographic area classification of handlers for the purpose of calculating prorated base if a handler can show that the production or marketing conditions in his area differ substantially from general conditions otherwise prevailing in that district. 7 CFR § 910.53(g).

This prorated base system of apportionment among handlers as provided for in the Act was adopted and has been amended several times after notice, a public hearing, and subsequent formal rule-making procedures. Recognition of geographic distinctions in production and marketing factors to achieve the equitable handler allotments provided for by the Act irrespective of geographic area

has been reflected in various agency decisions regarding such classifications. See, e.g., 35 Fed. Reg. 16,850, 16,853 (1970). This system, including its geographic distinctions, can only be judged on the basis of the record evidence compiled during such rulemaking processes. Petitioner has not claimed that this apportionment system is not supported by substantial record evidence. Therefore, this forum must uphold the lemon order provisions which define this system. Furthermore, the issue of the delineation of geographic districts for apportionment purposes is currently before the Secretary in the pending rulemaking proceeding. Review of the Secretary's decision to see if it is supported by the evidence in the record now being made will only be appropriate after the rulemaking process is finished.

With respect to the claim that the order discriminates against handlers of lemons grown in California and Arizona as opposed to other handlers who are not subject to regulation, this classification stems directly from the AMAA. The Act requires that marketing orders be limited in their application to the smallest region practicable consistent with effectuating the purposes of the Act and that marketing orders applicable to the same commodity in different regions shall contain different terms necessary to reflect the differences in the production and marketing of that commodity in such different areas. 7 U.S.C. § 608c(1)(B), (C). Regional differences in commodity marketing are rationally related to regional differences in marketing regulation. While this regional approach to commodity regulations may seem unfair to petitioner as a handler competing with handlers in unregulated areas, this does not invalidate the classification under the fifth amendment.

In the area of economics and social welfare, a State does not violate the Equal Protection Clause [and correspondingly the Federal Government does not violate the equal protection component of the Fifth Amendment] merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequity.' *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78. *Dandridge v. Williams* 397 U.S., at 485. . . . As long as the classificatory scheme chosen by Congress rationally advances a reasonable and identifiable governmental objective, we must disregard the existence of other methods of allocation that we, as individuals, perhaps would have preferred.

mination, the court may consider the contents of the regulatory flexibility analysis along with any other relevant material.

126 Cong. Rec. 21460-21461 (1980). Thus, in an instance such as this one where the agency has certified that no regulatory flexibility analysis is required, section 611 does not allow a court to review that decision.

Since the propriety of the agency's RFA certification is not reviewable, it cannot be the basis for a finding that the pro-rate regulations are "not in accordance with law." Hence, these allegations in the petition fail to state a claim upon which relief can be granted by this forum or any reviewing district court under section 8c(15) of the AMAA.

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Executive Order 12,291 is a presidential directive to agency rule makers to conduct cost-benefit, regulatory impact, and regulator review analyses in the process of making rules likely to have significant impact on the economy as defined in the executive order. The goal of Executive Order 12,291 is "to reduce the burdens of existing and future regulations, increase agency accountability for regulatory actions, provide for presidential oversight of the regulator process, minimize duplication and conflict of regulations and insure well-reasoned regulations." Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981), *reprinted in* 5 U.S.C. § 601 app. Executive Order 12,291 does not apply to rulemaking under the hearing procedure of section 556 of the APA. Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981), *reprinted in* 5 U.S.C. § 601 app. It does apply to other types of promulgation of "major rules", i.e. those with significant economic impact as defined by the executive order. *Id.* Petitioner contests the respondent's determination that Executive Order 12,291 did not apply to the imposition of volume controls on the handling of lemons under the lemon order. There is no jurisdiction to review this matter.

Executive Order No. 12,291, 46 Fed. Reg. 13,193, 13,198 (1981), *reprinted in* 5 U.S.C. § 601 app. provides the following with respect to judicial review: "This Order is intended only to improve the internal management of the Federal government, and it is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers or any person." With such language in the executive order, it is evident that the President intended to preclude suits instituted to enforce agency compliance with Executive Order No. 12,291.

Executive Order No. 12,291 is, thus, an administrative document within the executive branch of government rather than a delegated legislative action by the President. Therefore, it does not have the force and effect of law. As the Court of Appeals for the District of Columbia Circuit has noted: "Congress has given the District Court many important functions to perform, but they do not include policing the faithful execution of Presidential policies by Presidential appointees." *Manhattan-Bronx Postal Union v. Granowski*, 350 F. 2d 451, 457 (D.C. Cir. 1965), *cert. denied*, 382 U.S. 978 (1966).

Since failure to comply with Executive Order No. 12,291 cannot be the basis for a finding that the prorate regulations are "not in accordance with law", these allegations in the petition fail to state a claim upon which relief can be granted by this forum or any reviewing district court under section 8c(15) of the AMAA.

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The petition in this proceeding contains a rambling discourse of approximately ten pages that appears to be more related to second rate philosophy than any intelligible legal argument. Basically words and phrases are extracted out of context from those portions of the AMAA that state its general purposes (7 U.S.C. 601 and 602). These in turn are followed by attacks generally aimed at any type of volume regulations and by assertions of one or two alleged facts that intrinsically "prove" that volume regulations are the sole cause that the general purpose has not been totally achieved.

In the AMAA Congress stated certain general purposes and goals and gave the Secretary authority to promulgate marketing orders with specified provisions. On numerous occasions, as was noted above, the Secretary conducted formal rulemaking hearings to gather the best evidence on whether a marketing order was required and which of the specified provisions should be in such an order. If the industry concurred with the Secretary's evaluation, the marketing order took effect. The provisions in 7 U.S.C. 608c(15)(A) were created so handlers could voice objections that the marketing order provisions did not conform to the evidence at the

rulemaking hearing, violated the specific authorities in the AMAA or violated some other statute, or that regulations or obligations under the marketing order were similarly violative.

In this portion of the petition, the attack is not on any specific prorate regulation or portion of the current marketing policy. Rather it is on the marketing order provisions that authorize these documents. These attacks are not based on allegations that the lemon order provisions aren't specifically authorized under 7 U.S.C. 608c(6) or (7), or that they violate some other statute. Petitioner doesn't even claim the marketing order provisions aren't based on the rulemaking records that created them. Rather these attacks are an infantile plaint that the marketing order hasn't fully achieved all the goals and purposes of Congress and made Sequoia's world a happy place. Such attacks have no bearing on whether the marketing order provisions are "in accordance with law" and, hence, are not a cause of action upon which relief can be granted in a proceeding under 7 U.S.C. 608c(15)(A).

Such attacks are also misleading in that they fail to note that a formal rulemaking proceeding is in progress and that petitioner has fully participated at every step of the proceeding in presenting its economic and philosophic views as to the future of the lemon order.

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There are only three legitimate questions to be asked in a proceeding under 7 U.S.C. 608c(15). The first is whether the AMAA provides authority for a marketing order limiting the handling of lemons for fresh use. Under 7 U.S.C. 608c(2) and (6) such a marketing order is clearly authorized. The second question is whether the marketing order was promulgated in a procedurally correct

manner and was supported by substantial evidence in the formal rulemaking record. Petitioner does not even allege any deficiencies in this regard. The final question is whether the weekly limitation on the handling of fresh lemons is being accomplished in a procedurally correct manner and in accord with the relevant provision of the marketing order. Again, petitioner cannot make any legitimate objections. Hence, the Lemon Order limitation on the handling of fresh lemons is "in accordance with law" and the petitioner's challenge must fail.

Whether the limitation of the handling of fresh lemons promotes a societal goal and whether that goal could better be accomplished through free enterprise or through the use of some other AMAA authorized provisions are all questions that may be explored in a formal rulemaking hearing under 7 U.S.C. 608c(3), (4), and (17). However, the fact that such economic and philosophic questions may exist does not render the current lemon order and its provisions "not in accordance with law" and subject to relief in this forum. Hence, petitioner has again failed to state a cause of action upon which relief can be granted.

H. Termination

Petitioner correctly states that 7 U.S.C. 608c(16)(A) provides that the Secretary shall terminate an order (or a provision of an order) when he finds it does not effectuate the purposes of the AMAA. However, the Secretary has made no such finding and the petitioner has not even alleged that such a finding has been made. Hence, the Lemon Order is not susceptible to attack in this forum as "not in accordance with law."

It might be noted that the question of termination or continuance or modification of prorate is presently before the Secretary in the above-cited formal rulemaking proceeding. If prorate is continued or modified, then petitioner can file a petition under 7 U.S.C. 608c(15)(A) to challenge such a conclusion if petitioner does not believe it to be supported by substantial evidence in the rulemaking record.

I. Constitutional Issues

Petitioner claims that the use of market volume controls in the lemon order deprives it of liberty and property without due process of law, takes its property without just compensation, and denies it equal protection vis a vis other lemon handlers, all in alleged violation of the fifth amendment to the Constitution; and denies it freedom of association in violation of the first amendment to the Con-

stitution. Courts have long since held, however, that the AMAA and resultant marketing orders are constitutional.

1. *The Use Of Market Volume Controls Through The Lemon Order Is Within The Constitutional Power Of Congress To Regulate Commerce.*

Well over forty years ago the Supreme Court held that it is within the power of Congress under the commerce clause of the Constitution to prohibit absolutely all interstate commerce. *Mulford v. Smith*, 307 U.S. 38,48 (1939), citing *Currin v. Wallace*, 306 U.S. 1 (1939). Therefore, the Court held in *Mulford v. Smith* that Congress could limit the amount of a given commodity which may be transported in such commerce and that Congress' motive in exerting that power was irrelevant to its legitimacy. Consequently, the Court upheld the Secretary's issuance of a marketing quota on tobacco under the authority of the Agricultural Adjustment Act of 1938, a precursor of the Act under consideration herein, as both a legitimate exercise of the commerce power and a constitutional delegation of such power to the Secretary. *Mulford v. Smith*, *supra*.

In *United States v. Rock Royal Co-op*, 307 U.S. 533, 569-76 (1939) and *H.P. Hood & Sons v. United States*, 307 U.S. 588, 594-95 (1939) the Supreme Court rejected arguments that the Agricultural Marketing Agreement Act of 1937, was an invalid exercise of Congress' power to regulate commerce and that the Act involved unconstitutional delegations of legislative power to the Secretary. The Court noted in *Rock Royal Co-op*, 307 U.S. at 569, that Congress' "power over commerce where it exists is complete and perfect." The Court also later found that by the Act Congress intended to exercise the full reach of that power, that the power to regulate interstate commerce implied every other power necessary to make such regulation effective, and reaffirmed the Act's constitutionality. *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 118-19, 123-25 (1942).

Even before the Supreme Court had reached its conclusions that the Act was constitutional, the Court of Appeals for the Ninth Circuit had so concluded. In *Edwards v. United States*, 91 F.2d 767, 780-83 (9th Cir. 1937), the court found that a marketing order which provided for weekly limitations on the quantity of California and Arizona oranges which could be shipped in commerce and which allowed an industry advisory committee to allot such limitation among handlers was a constitutional exercise of the commerce power. Accord, *Wallace v. Hudson-Duncan & Co.*, 98 F. 2d (9th Cir. 1938).

2. *The Imposition Of Market Volume Controls Does Not Deprive Petitioner Of Liberty Or Property Without Due Process Within The Meaning Of The Fifth Amendment To The Constitution.*

Petitioner alleges that it has been deprived of liberty and property without due process, because the imposition of controls on the number of lemons which may be marketed interferes with, *inter alia*, its right to contract freely and to receive the maximum possible compensation for the sale of lemons. These arguments have also been rejected by courts long ago. Interference with the liberty and property rights inherent in the ability to contract freely was rejected by the Supreme Court in *Rock Royal Co-op*, *supra* at 569, 572, as a basis for finding a milk marketing order in violation of the Constitution. The Court found that the provisions of the marketing order were nonetheless reasonably related to the power to regulate commerce which the Court had found "complete and perfect." *Id.*, see also, *H.P. Hood & Sons v. United States*, *supra* at 594-95 (a milk marketing order provision requiring handler payments for milk to be channeled through a regulatory equalization fund did not violate the due process clause of the fifth amendment to the Constitution).

With respect to a marketing order for oranges which set up volume controls and handler allotments in a manner virtually identical to the lemon order at issue herein, the Court of Appeals for the Ninth Circuit in 1937 rejected contentions that such volume controls were contrary to the fifth amendment's provisions for liberty of contract. *Edwards v. United States*, *supra* at 783-85. That court later elaborated on its reasoning in another case in which it upheld the constitutionality of a walnut marketing order despite the fact that it might be said to have destroyed property rights or the liberty to contract or engage in business freely. *Wallace v. Hudson-Duncan & Co.*, *supra* 991-93. In *Wallace v. Hudson-Duncan & Co.* the court found that the marketing order did not violate the fifth amendment, because the means adopted by the Secretary, i.e., the marketing order, were reasonably related to the declared object of the Act. *Id.* at 992. In judging that relationship the court noted that such a rational relationship would be presumed unless there were evidence to the contrary. *Id.* In *Whittenburg v. United States*, 100 F. 2d 520 (5th Cir. 1938), the Court of Appeals for the Fifth Circuit upheld the constitutionality of a grapefruit marketing order which limited the volume through weekly limits and handler allotments and prorations just as the lemon order does herein. In *Whittenburg* the Court noted that "collisions between private right [liberty of contract] and exertions of police power for the public good result generally in the prevalence of the public good." *Id.* at 528.

The court therein also pointed out that before any interference in property rights occurred through the imposition of volume controls under a marketing order, the Act required notice and a hearing for those to be affected and provided for judicial review of the Secretary's order promulgating a volume control regulation in a marketing order. *Id.* As proper hearing procedures had been accorded, the court found that liberty and property had not been taken without due process of law.

Petitioner in the present proceeding claims that the lemon order causes it to incur financial losses which it would not incur were such regulation absent, and that the lemon order does not meet the rational relationship test of constitutionality because it does not fulfill the purposes of the AMAA. Petitioner claims that it is respondent's burden to demonstrate the rational relationship. However, as the Court of Appeals for the Ninth Circuit noted in *Wallace v. Hudson-Duncan & Co.*, *supra* at 992, it is petitioner's burden to overcome a presumption of a rational basis for the marketing order. The AMAA allows the Secretary to impose market volume controls for lemons when he finds from evidence introduced at the required hearing that such regulation will fulfill the purposes of the Act. 7 U.S.C. § 608c(3), (4), (6). That is precisely what happened here. 6 Fed. Reg. 1833 (1941). Judicial review of whether such regulation does tend to fulfill the purposes of the Act and as such is reasonably related to achieving legitimate goals is limited to a determination of whether the Secretary's decision that the regulation would promote the purposes of the Act was supported by substantial evidence introduced at the rulemaking hearing required by the Act prior to the issuance of a marketing order. 5 U.S.C. § 706(2)(E); see *Chiglaides Farm Ltd. v. Butz*, 485 F. 2d 1125, 1129 (5th Cir. 1973). Petitioner has failed to allege that the regulation is not supported by substantial evidence introduced at the rulemaking hearing. Thus, it can not possibly overcome the presumption that the regulation is rationally related to the goals of the Act, and this forum must dismiss the allegations that the lemon order is unconstitutional because it does not effectuate the goals of the Act. As there is not even a single allegation that the Secretary did not follow procedures prescribed under the Act in enacting the lemon order or that the Secretary's initial decision that the lemon order's volume control provisions would effectuate the Act is not supported by substantial evidence, the petition fails to state a claim upon which relief can be granted. Furthermore, the issue of whether the volume control provisions are still effectuating the AMAA is being reviewed by the Secretary in the current rulemaking proceeding. That issue may only be reviewed, if the Secretary's decision is un-

favorable to petitioner, on the basis of evidence of record in that proceeding.

3. The Imposition Of Market Volume Controls Do Not Constitute A Taking Of Private Property Within The Meaning Of The Fifth Amendment To The Constitution.

Petitioner maintains that economic losses which it allegedly suffers as a result of the imposition of volume controls under the lemon order constitute the taking of private property in violation of the fifth amendment. This issue was considered by courts long ago and such contentions were rejected. In 1939 in *Mulford v. Smith, supra* at 49-51, the Supreme Court held that despite cash investments by tobacco growers in crops they could not market that year due to the imposition of tobacco allotments among farmers, the financial losses did not constitute a taking of such farmers' property in violation of the fifth amendment. The Court of Appeals for the Ninth Circuit held in 1938 that even if a marketing order materially reduced a person's property rights or destroyed a person's property in the exercise of the commerce power, there is no "taking" within the meaning of the fifth amendment, because there is no direct appropriation of property from such person by the government. *Wallace v. Hudson-Duncan & Co, supra* at 989-91, citing *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923). In pertinent dictum the court of appeals also noted that even if the economic losses were a "taking" it would be justified by a public purpose with compensatory benefits to farmers of higher prices for their products. 98 F. 2d at 991. A recent marketing order case dealing with the issue of whether a taking was presented by government price regulation under a marketing order followed the precedent and reasoning of *Wallace v. Hudson-Duncan & Co., supra*. *Prune Bargaining Ass'n v. Butz*, 444 F. Supp. 785, 793 (N.D.Ca 1975).

In light of the above decisions, petitioner's alleged economic losses from the operation of the lemon order do not constitute a taking of its property without just compensation within the meaning of the fifth amendment.

4. The Lemon Marketing Order Does Not Discriminate Against Any Group Of Handlers In Violation Of The Due Process Clause Of The Fifth Amendment To The Constitution.

Petitioner alleges that under the lemon marketing order, it is allowed to ship fewer lemons than handlers with growers in other geographic districts under the order and handlers with growers in entirely unregulated areas and that volume controls discriminate among handlers in different production districts on the basis of

sales opportunities, income, and prorate limitations. Petitioner alleges by implication that the lemon marketing order dictates different prices for handlers with growers in different geographic districts. Petitioner claims that these discriminations among some handlers violate its rights under the fifth amendment to the Constitution.

The fifth amendment's guarantee of due process includes the concept of equal justice under law. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976). Equal protection analysis under the fifth amendment is the same type as has been developed under the equal protection clause of the fourteenth amendment. *Buckley v. Valeo*, 424 U.S. 1, 93 (1976). This analysis only entails a limited judicial review of legislative classifications of persons for different treatment under the law to determine if such classifications are rationally related to a legitimate governmental objective. *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981). The rational relationship analysis has been used previously by the Supreme Court to uphold distinctions made between handlers under the Act. *United States v. Rock Royal Co-op*, 307 U.S. 533, 564-65 (1939).

The AMAA provides for the method incorporated in the lemon marketing order of limiting the quantity of a commodity handled and apportioning that quantity equitably among all handlers. 7 U.S.C. § 608c(6). Such commodity volume regulation as will further the interests of farmers and consumers and will provide for orderly marketing has been found to be a valid governmental goal within the power of Congress under the commerce clause of the Constitution. Under the lemon marketing order the equitable apportionment among all handlers of the total quantity of lemons which may be allowed to be handled during any week is achieved through the prorate base system. The differentiation in calculating the prorate base among different geographic areas is based on the differences among these areas in production and marketing conditions. 7 CFR § 910.53(e). The lemon marketing order also allows for exceptions to this geographic area classification of handlers for the purpose of calculating prorate base if a handler can show that the production or marketing conditions in his area differ substantially from general conditions otherwise prevailing in that district. 7 CFR § 910.53(g).

This prorate base system of apportionment among handlers as provided for in the Act was adopted and has been amended several times after notice, a public hearing, and subsequent formal rule-making procedures. Recognition of geographic distinctions in production and marketing factors to achieve the equitable handler allotments provided for by the Act irrespective of geographic area

has been reflected in various agency decisions regarding such classifications. See, e.g., 35 Fed. Reg. 16,850, 16,853 (1970). This system, including its geographic distinctions, can only be judged on the basis of the record evidence compiled during such rulemaking processes. Petitioner has not claimed that this apportionment system is not supported by substantial record evidence. Therefore, this forum must uphold the lemon order provisions which define this system. Furthermore, the issue of the delineation of geographic districts for apportionment purposes is currently before the Secretary in the pending rulemaking proceeding. Review of the Secretary's decision to see if it is supported by the evidence in the record now being made will only be appropriate after the rulemaking process is finished.

With respect to the claim that the order discriminates against handlers of lemons grown in California and Arizona as opposed to other handlers who are not subject to regulation, this classification stems directly from the AMAA. The Act requires that marketing orders be limited in their application to the smallest region practicable consistent with effectuating the purposes of the Act and that marketing orders applicable to the same commodity in different regions shall contain different terms necessary to reflect the differences in the production and marketing of that commodity in such different areas. 7 U.S.C. § 608c(11)(B), (C). Regional differences in commodity marketing are rationally related to regional differences in marketing regulation. While this regional approach to commodity regulations may seem unfair to petitioner as a handler competing with handlers in unregulated areas, this does not invalidate the classification under the fifth amendment.

In the area of economics and social welfare, a State does not violate the Equal Protection Clause [and correspondingly the Federal Government does not violate the equal protection component of the Fifth Amendment] merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequity.' *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61,78. *Dandridge v. Williams* 397 U.S., at 485. . . . As long as the classificatory scheme chosen by Congress rationally advances a reasonable and identifiable governmental objective, we must disregard the existence of other methods of allocation that we, as individuals, perhaps would have preferred.

Schweiker v. Wilson, 450 U.S. 221, 234-35 (1981). Therefore, the petition also fails to state a cause of action in this regard.

5. The Establishment Of The LAC To Recommend Market Volume Controls To The Secretary Is Not An Unconstitutional Delegation Of Legislative Authority To Private Persons.

Petitioner alleges that USDA has deprived petitioner of its fifth amendment procedural due process rights by unconstitutionally delegating authority to limit the quantity of lemons which may be handled to the LAC. The LAC, however, which is established pursuant to the lemon marketing order and in accordance with the Act, does not have or exercise any authority to limit the quantity of lemons which may be handled. The AMAA provides that all marketing orders shall include terms:

(C) Providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their powers and duties, which shall include only the powers:

- (i) To administer such order in accordance with its terms and provisions;
- (ii) To make rules and regulations to effectuate the terms and provisions of such order;
- (iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and
- (iv) To recommend to the Secretary of Agriculture amendments to such order.

No person acting as a member of an agency established pursuant to this paragraph shall be deemed to be acting in an official capacity, within the meaning of section 610(g) of this title, unless such person receives compensation for his personal services from funds of the United States. . . .

7 U.S.C. § 608c(7)(C). The lemon marketing order, which provides for the establishment of a thirteen member LAC, consisting of eight growers, four handlers and one nonindustry member, limits the duties of the LAC to those specified by the Act as set forth above. 7 CFR § 910.20, .30. Among the duties of the LAC are the duties to investigate the growing, shipping and marketing conditions with respect to lemons, to assemble data on such conditions, to furnish the Secretary such available information as he may request, to formulate an annual marketing policy which contains in-

formation on supply and demand conditions, any other pertinent factors bearing on the marketing of lemons and a schedule of estimated weekly shipments to be recommended to the Secretary during the fiscal year, and, finally, when its investigations of supply and demand make handling limitations advisable, to recommend to the Secretary the quantity of lemons which it deems advisable to be handled during a week. 7 CFR § 910.31(c), (d), .50, .51(a). In recommending weekly limitations the LAC must consider specified factors. 7 CFR § 910.51(b). Under the lemon marketing order the LAC may only investigate economic conditions and recommend market volume controls. Under the order only the Secretary has the power to limit the quantity of lemons which may be handled during a specific week. The Secretary may impose and determine the amount of such a limitation whenever any information, including LAC recommendations and reports, indicate to the Secretary that a limitation will tend to effectuate the Act. 7 CFR § 910.52. Once the Secretary fixes such a weekly limit, the LAC carries it into effect by following order provisions for determining handler allotments.

In the present case the LAC clearly acts in an administrative advisory capacity to assist the Secretary to carry out the terms of the order which the Secretary has enacted. While the LAC's expert recommendations made in accordance with the terms of the order assist the Secretary in carrying out his functions, only the Secretary has any power to impose limitations on the number of lemons which may be handled. The Secretary has not delegated his power to impose marketing volume controls, and the functions given to the LAC do not constitute a *de facto* delegation of such power. The Secretary alone exercises his discretion to impose controls, and the marketing order sets out the criterion for its exercise, i.e. whether weekly limits will "tend to effectuate the declared policy of the [A]ct." 7 CFR § 910.52. The fact that the LAC recommendations made pursuant to the order and in accordance with the Act may become the basis for action by the Secretary does not mean that the LAC is the one exercising the authority to impose volume controls.

Regulatory schemes such as this which incorporate industry committees to assist the government in carrying out regulations have long been upheld. In *Edwards v. United States*, *supra* at 767, the Court of Appeals for the Ninth Circuit found that the marketing order provisions of the precursor to the present Act did not delegate legislative authority to private individuals even though the orange marketing order contained provisions for a grower committee to administer the order. In *Mulford v. Smith*, *supra* at 44, the

United States Supreme court upheld the constitutionality of a tobacco allotment program which included provisions for apportionment of the tobacco quota among individual farms by local committees of farmers according to standards "prescribed in the Act, amplified by regulations and instructions issued by the Secretary."

The two cases which dealt directly with the issue of delegation to industry committees under the AMAA arose in the Fifth Circuit. In *Whittenburg v. United States*, 100 F.2d 520 (5th Cir. 1938), the court was faced with a challenge to the delegation of the authority to a growers committee and to a shippers committee under a citrus fruit marketing order which allowed such committees to investigate conditions and make recommendations to the Secretary on weekly shipping limits and allotments. The court upheld the constitutionality of the regulatory scheme on the ground that the committees who recommend regulations are not given any legislative power or any power to force the Secretary to regulate. *Id.* at 522. "Action taken is always that of the Secretary. These others gather and present information to give him a broader view of the situation. Their concurrence gives his action support and tends to assure its enforcement. But they have no actual power." *Id.* at 523.

The Court of Appeals for the Fifth Circuit recently affirmed the *Whittenburg* holding in a case involving a celery marketing order under which an industry committee was given authority to recommend handling limits on celery. *Chiglaides Farm, Ltd. v. Butz*, 485 F.2d 1125 (5th Cir. 1973). The court noted that Congress had "approved the use of such producer-controlled committees on the theory that the most sound decisions will result from permitting those in the area with the greatest knowledge of the industry's needs to make recommendations to the Secretary. See, e.g., Sen. Rep. No. 566, 87th Cong., 1st Sess. p. 39." *Id.* at 1134. The court relied upon the sole power to act resting with the Secretary as noted in *Whittenburg*. *Id.* The Court rejected plaintiffs' arguments that the committee vested control of the industry in a group of self-interested producers, thereby depriving plaintiffs of due process, and that despite the Secretary's ultimate authority he exercised no independent judgement. In rejecting such arguments the court relied on the effective checks on committee power contained in the order including, *inter alia*, the fact that the Secretary selected committee members, received all recommendations and actually acted to limit the handling of the commodity. *Id.*

The reasons which prompted the Court of Appeals for the Fifth Circuit to reject claims of unconstitutional delegation of authority to industry committees are equally applicable in the present case. Further, the principles upon which the court acted in those two

marketing order cases have been relied upon by other courts of appeals in deciding delegation issues in other contexts. The Court of Appeals for the Second and Third Circuits have found that a statute providing for self-regulation of over-the-counter securities dealers by a private dealers association is not an unconstitutional delegation of legislative power to a private institution, on the grounds that the Securities and Exchange Commission has the power to approve or disapprove the association's rules and to make an independent review of disciplinary actions taken by the association. *First Jersey Securities, Inc. v. Bergen*, 605 F. 2d 690, 697 (3rd Cir. 1979); *Todd & Co., Inc. v. Securities & Exchange Com'n*, 557 F. 2d 1008, 1012-13 (3rd Cir. 1977); *R. H. Johnson & Co. v. Securities & Exchange Com'n*, 198 F. 2d 690, 695 (2d Cir. 1952) cert. denied, 344 U.S. 855 (1952).

In the present case although the LAC assists the Secretary in informing him of industry conditions and giving him their regulatory recommendations, the Secretary retains the power actually to regulate based upon committee recommendation or other available information. For the reasons discussed in the above cases such industry assistance does not rise to the level of an unconstitutional delegation of legislative authority which deprives petitioner of its procedural due process rights.

6. The Lemon Marketing Order Does Not Deprive Petitioner Of Its Rights Under The First Amendment To The Constitution.

Petitioner alleges that the imposition of market volume controls infringes upon its freedom of association under the first amendment in that it limits its association with customers of its own choosing by limiting the number of lemons it may sell and, thus, the number of customers to whom it may sell them, and it forces petitioner to associate with an economic idea repugnant to petitioner. Neither of petitioner's claims comes within the type of freedom of association protected by the first amendment.

The freedom of association protected by the first amendment is a penumbral right not explicitly set out in the amendment itself. "[T]he right of individuals to associate to further their personal beliefs . . . has long been held to be implicit in the freedoms of speech, assembly, and petition." *Healy v. James*, 408 U.S. 169, 181 (1972). This freedom to associate with others "stemmed from the [Supreme] Court's recognition [in *NAACP v. Alabama*, 357 U.S. 449, 460 (1958)] that '[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.'" *Buckley v. Valeo*, 424 U.S. 1, 15 (1976). The orderly group activity of advancing common beliefs and

ideas is the freedom of association protected by the first amendment. *Elrod v. Burns*, 427 U.S. 347, 357 (1976). Most commonly this freedom protects association for political expression. See, e.g., *Huckley v. Valeo* and *Elrod v. Burns*, *supra*. However, it is immaterial what the group beliefs being advanced are, be they political, economic, religious or cultural. *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 460 (1958). The key element, nevertheless, is that people associate in a group for the purpose of advancing their common beliefs of whatever ilk. *Id.*, see also, *N.A.A.C.P. v. Button*, 371 U.S. 415, 430 (1963). Thus, the freedom of association which protects group activities and group membership has been found to prohibit the following: the conditioning of public employment on political party affiliation, *Elrod v. Burns*, *supra*; the nonrecognition of radical student political organizations by colleges, *Healy v. James*, *supra*; the requirement that teachers list all the organizations they have belonged to during the past five years as a condition of employment, *Shelton v. Tucker*, 364 U.S. 479 (1960); the requirement that an organization give the state a list of all its members as a condition of "doing business" in that state, *N.A.A.C.P. v. Alabama*, *supra*; the proscription of association for litigation purposes, *N.A.A.C.P. v. Button*, *supra*; and the refusal to license a qualified lawyer for belonging to a political organization or for refusing to answer questions about such an association, *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971).

Nowhere in the petition has petitioner alleged that it has been prevented or restrained from joining with other people to further its political or economic views or that it has been forced to join an organization which holds views repugnant to it. Associating with an unlimited number of customers to sell them lemons does not rise to the level of the cherished freedom to associate with others to advocate or express one's belief that is protected by our Constitution. Similarly, economic regulation of the number of lemons a handler may buy or sell can not reasonably be said to force petitioner to join with others in a group to espouse views which are opposed to petitioner's free market beliefs. As this critical element of group association for the purpose of expression is missing from this petition, petitioner's first amendment allegations must fail. These allegations are merely a strained attempt to characterize the mundane as the significant, by clothing petitioner's dissatisfaction with the lack of a free market for lemon handlers in borrowed, ill fitting, and totally inappropriate constitutional garb."

Thus, the Petition should be dismissed. 7 CFR 900.52(c).

ORDER

The Petition is dismissed. The Order Granting Motion to Dismiss became final February 13, 1986.

In re: ECHO SPRING DAIRY, INC., AMA Docket No. M124-2. Decided February 25, 1986.

Petitioner does not qualify as a "producer-handler". The Judicial Officer affirmed Judge Palmer's order sustaining the determination by the Market Administrator of Order No. 124 that petitioner did not qualify as a "producer-handler" under the Order, and that petitioner is obligated to pay \$452,973.00 to the Market Administrator because petitioner's operation of a leased dairy farm was not the personal enterprise and the personal risk of petitioner. Petitioner had a joint checking account with the lessor of the dairy farm under which petitioner was able to utilize the financial resources of the lessor and other entities participating in the joint bank account. The producer-handler exemption must be strictly construed. Petitioner has the burden of proving that the Market Administrator's determinations are "not in accordance with law." Great weight is given to the Market Administrator's interpretation of the order.

Michael J. Gentry, for petitioner.

Mary Kyle Hobbie, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is an appeal to the Judicial Officer from an initial Decision and Order filed by Administrative Law Judge Victor W. Palmer (ALJ) on October 22, 1985, under the Agricultural Marketing Agreement Act of 1937, as amended.¹ Final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated to the Judicial Officer (7 CFR § 2.35).² The

¹ In view of the different situations in the various milk marketing areas, there is a wide variation in the pricing provisions of the orders. For a general description of the milk marketing regulatory program under the Act, see *Leshigh Valley Coop. v. United States*, 370 U.S. 75, 78-81 (1962); *United States v. Rock Royal Co-op*, 307 U.S. 533, 542-45 (1939); *Fairmont Foods Co. v. Hardin*, 442 F.2d 762, 764 (D.C. Cir. 1971). See generally Veine, "Federal Marketing Order Programs," in 1 *Agricultural Law* ch. 2 (J. Davidson ed. 1981); Brooks, "The Pricing of Milk under Federal Marketing Orders," 26 *Geo. Wash. L. Rev.* 181 (1958).

² The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 460e-460g), and Reorganization Plan No. 2 of 1953, 18 *Fed. Reg.* 3219 (1953), reprinted in 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Off-

Continued

case was referred to the Judicial Officer for decision on December 27, 1985.

The ALJ sustained the determination by the Market Administrator of Federal Milk Order No. 124 that petitioner did not qualify as a "producer-handler" under the Order from November 1983 through December 1984. As a result, petitioner is obligated to pay a total of \$432,973.06 to the Market Administrator.

Based upon a careful consideration of the entire record in this case, the initial Decision and Order is adopted as the final Decision and Order (with a few trivial changes). Additional conclusions by the Judicial Officer follow the ALJ's decision.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

PRELIMINARY STATEMENT

This proceeding was initiated under section 15(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 608c(15)(A); "the Act"), by a petition filed by a milk handler regulated by Federal Milk Order No. 124 (7 CFR 1124 *et seq.*; "Order 124"). Petitioner, Echo Spring Dairy, Inc. (Echo Spring), alleges that Order 124's Market Administrator incorrectly determined that petitioner did not qualify as a "producer-handler" under Order 124 from November 1983 through December 1984. Petitioner seeks reversal of this adverse determination which disqualified Echo Spring from exemption from monetary assessments under the terms of Order 124, and the vacating of the resulting producer-settlement fund and administrative fund assessments levied by the Market Administrator.

An oral hearing was held before me in Portland, Oregon, on June 18, 1985, at which petitioner and respondent were represented by their attorneys, Michael J. Gentry and Mary Kyle Hobbio, respectively. Briefing was completed on September 3, 1985.

Upon consideration of the record evidence and the written and oral arguments by the parties, the attached order is being entered this day dismissing the petition, and denying the remedy therein requested.

FINDINGS OF FACT

1. Echo Spring is an Oregon corporation which, prior to July 1, 1983, operated as a fully regulated pool plant under Order 124, and was fully subject to the Order's terms, provisions, and assessments ~~for, and 5 years as administrator of the Packers and Stockyards Act regulatory pro-~~ grams.

payable to the producer-settlement fund and the administrative fund.

2. On July 1, 1983, Echo Spring leased from Maddox Dairy, Ltd., the Maddox Dairy, located in Burrel, California.

3. On July 1, 1983, Maddox Dairy, Inc., became a 20% shareholder in Echo Spring, and one of its officers, Mr. Steve Maddox, was hired and paid by Echo Spring to run its new dairy division in Burrel, California.

4. Approximately half of the milk produced at the dairy farm in Burrel actually goes to Echo Spring's creamery in Eugene, Oregon. The rest is sold to Danish Cooperative Creamery in Fresno, California.

5. By letter of June 30, 1983, the Market Administrator gave tentative approval to a request by Echo Spring to thereafter be designated as a producer-handler pursuant to section 1124.12 of Order 124.

6. Since July 1, 1983, Echo Spring has been operated as a corporation having two separate divisions—its processing and distribution plant, located in Eugene, Oregon, known as the Creamery Division, and the dairy farm in Burrel, California, known as Maddox Dairy-Division of Echo Spring Dairy.

7. In November 1983, Maddox Dairy-Division of Echo Spring entered into a bank accounting system, a concentration account, in company with several of the Maddox entities. The account was based on a zero base accounting method whereby the money in eleven individual checking accounts was pooled in one common account and the balance of each individual account was zero at the end of each business day.

8. The books and records regarding the participation of Maddox Dairy-Division of Echo Spring in the concentration account were not maintained with Echo Spring's other books and records in Eugene, Oregon, but were maintained instead in the Maddox offices located in Riverdale, California. The accounting procedures for Maddox Dairy-Division of Echo Spring were handled by Mr. Rick Stacy who, although an independent accountant, spends 100% of his working hours on the accounts of Maddox entities and, as part of those duties, handled the accounting procedures of Maddox Dairy-Division of Echo Spring.

9. The parties have stipulated to:

a. the existence of the bank account numbers representing the concentration account at the Crocker National Bank in which Echo Spring began participation in November 1983;

b. the authenticity of the bank account records and statements of the concentration account, known as the Ru-Ann-Maddox account;

c. the authenticity of the bank account statements for Maddox Dairy-Division of Echo Spring, Inc.;

d. the authenticity of the documents identified as "Danish Creamery to Maddox, Ltd., producer or patron statements"; and

e. the authenticity and correctness of all of the mathematical calculations and figures representing the amounts claimed to be due by the Market Administrator (but not that the amounts are due).

10. As a result of the implementation of the concentration account, Echo Spring was able to deposit money in and draw money from the common account. In the months of November 1983 through December 1984, a total of 14 months, Echo Spring drew more money from the concentration account than it had deposited in the account in at least seven months.

11. Echo Spring maintained a close financial relationship with the Maddox entities through the concentration account which diluted the risk to Echo Spring in conducting business.

12. Order No. 124 requires monthly reports and accounting from producer-handlers.

13. The Market Administrator conducted an audit of the books and records of the Dairy Division in Riverdale in early July 1984. This was the first audit of the Riverdale location since the implementation of the concentration account.

14. As a result of that audit, the Market Administrator determined that Echo Spring was not a producer-handler as defined by section 12 of Order 124 (7 CFR 1124.12), in that Echo Spring had not offered proof satisfactory to the Market Administrator that the care and management of all dairy animals and other resources necessary to produce the entire volume of fluid milk was the personal enterprise of and at the personal risk of Echo Spring.

15. The Market Administrator met with officials of Echo Spring in August and September of 1984 and told them that, in his opinion, they had lost producer-handler status by their use of the concentration account.

16. By letter dated September 28, 1984, the Market Administrator sent Echo Spring his written determination that Echo Spring was not a producer-handler and stated the basis of his determination as follows:

"The basis of this decision is that the leased dairy farm operation of Maddox Dairy, Ltd. located at Burrell, California

is not the personal enterprise and the personal risk of Echo Spring Dairy, Inc. Specifically, the monies of Echo Spring Dairy, Inc. are combined with monies of various business enterprises of Maddox Dairy, including two other dairy farms which are not controlled by Echo Spring Dairy, Inc. Money deposited in an account of Maddox Dairy-Division of Echo Spring is transferred to the Ru-Ann-Maddox Dairy Concentration Account in the Crocker National Bank where it is combined with income from several other Maddox Dairy enterprises, including Maddox Dairy-Division of Echo Spring. The control of the Ru-Ann-Maddox Concentration Account is by Maddox Dairy and not by Echo Spring Dairy, Inc. Therefore, the personal risk required by § 1124.12(b) is not being entirely borne by Echo Spring Dairy, Inc."

17. In response to my request, the Market Administrator, by letter of March 11, 1985, further explained the basis of his determination that Echo Spring Dairy was not a producer-handler pursuant to § 1124.12 of Federal Milk Order No. 124 for the period of November 1983 through December 1984. He stated, and I find on the basis of the substantial evidence of record, the following bases for his determination:

1. Echo Spring Dairy Inc.'s monies were being combined with monies from Ru-Ann Dairy, Maddox Dairy, Ltd. and Burrel Farms, Inc. in the Ru-Ann-Maddox Concentration Account #032-316336 in the Crocker National Bank, Fresno, California. The entities other than Echo Spring Dairy, Inc. which participated in the Concentration Account were not controlled by Echo Spring Dairy, Inc. The Concentration Account was a system in which funds from all the various bank accounts of Ru-Ann Dairy, Maddox Dairy, Ltd., Burrel Farms, Inc. and their subsidiaries as well as funds of Echo Spring Dairy, Inc. were deposited in a central account. When any of the above business enterprises needed funds to pay their obligations, the bank would transfer from the Concentration Account the amount of funds needed to cover the checks of the various individual accounts. Funds needed by Echo Spring Dairy, Inc. to pay obligations of their dairy farm operation were handled in this way. If the monies Echo Spring Dairy, Inc. deposited in the Concentration Account were not sufficient to cover their obligations, monies deposited by the other entities party to the Concentration Account were used to

pay the obligations of Echo Spring Dairy, Inc. The general ledger and the balance sheet of the Echo Spring dairy farm operation did not carry such deficiencies in deposits to the Ru-Ann-Maddox Concentration Account as a liability nor did the general ledger and balance sheet account for any excess in deposits as a receivable. Therefore, Echo Spring Dairy, Inc. was not bearing the personal risk of all the obligations of the dairy farm operation. Although there was a schedule prepared which showed the debits and credits by Echo Spring Dairy, Inc. to the Ru-Ann-Maddox Concentration Account, the only general ledger entries made are those that normally affect the Echo Spring Dairy, Inc. cash account and the offsetting entries to the general ledger. General ledger entries are not made showing the transactions between the Echo Spring Dairy, Inc. cash account and the Ru-Ann-Maddox Concentration Account.

2. The Creamery Division of Echo Spring Dairy, Inc. paid the Dairy Division of Echo Spring for milk received at its plant in Eugene, Oregon. The amount of payment was based on the classified use value of the milk at the Eugene plant using the class prices and the use classifications as established under the Oregon-Washington order with a minor adjustment for Class II milk. The payments were made on dates approximating the producer payment dates in the Oregon-Washington order. Payments were either wire-transferred to the Crocker National Bank or mailed to the offices maintained by Ru-Ann Dairy and Maddox Dairy, Ltd. in Riverdale, California. If there were any changes made in the use classification at the Eugene plant of Echo Spring Dairy, Inc. as a result of the Market Administrator's audit, no adjustments were made in payments to the Dairy Division of Echo Spring Dairy, Inc. No other payments were made to the Dairy Division by the Creamery Division.

3. Echo Spring Dairy, Inc. maintains two completely independent sets of books and records and bank accounts for their two divisions. The one for the Creamery Division is located at Eugene, Oregon. This set of books and records is maintained and controlled by employees of Echo Spring Dairy, Inc. They include all records pertaining to the operation of the processing plant as well as the sales journal, cash disbursement journal, general ledger and payroll

records. The statements for the bank account maintained at Centennial Bank, Eugene, Oregon and all records pertaining to this bank account are also kept in Eugene, Oregon. This bank account is used to pay the obligations of the Creamery Division of Echo Spring Dairy, Inc. The Dairy Division records of Echo Spring Dairy, Inc. are maintained at Riverdale, California and kept separate from the records of the Eugene operation. The records maintained at Riverdale are those pertaining to the operation of the leased dairy farm located at Burrel, California, the sale and payments of milk to Danish Cooperative Creamery, the hauling records on milk delivered to the Eugene, Oregon plant, cash disbursements, purchase journals, payroll records and general ledger. The employees who maintain and control the books and records of Ru-Ann Dairy, Maddox Dairy, Ltd., Burrel Farms, Inc. and their subsidiaries are the same persons who maintain and control the books and records of the Dairy Division of Echo Spring Dairy, Inc. There is no reimbursement for the services of these employees by Echo Spring Dairy, Inc. The Creamery Division of Echo Spring Dairy, Inc. furnishes to the Riverdale office a summary of their general ledger each month in order that a statement of operations and balance sheet can be made for each division along with a consolidated balance sheet and statement of operation for Echo Spring Dairy, Inc. Other than the money paid to the Dairy Division for milk delivered to the Eugene plant, there are no other payments made by the Creamery Division to the Dairy Division. The only adjustments made in the preparation of the consolidated statement of operation is for the movement of milk between the two divisions.

4. The Echo Spring Dairy, Inc. Dairy Division made lease payments for the dairy farm to Maddox Dairy, Ltd. out of all funds deposited in the Ru-Ann-Maddox Concentration Account. The Dairy Division issued a check to Maddox Dairy, Ltd. and that check was deposited into their account in the Crocker National Bank and on the same day was transferred to the Ru-Ann-Maddox Concentration Account. All transactions between the Echo Spring Dairy, Inc. Dairy Division and Ru-Ann Dairy and Burrel Farms, Inc. were handled in a similar manner.

5. In addition to the milk delivered to the Echo Spring Dairy, Inc. Creamery Division, the Echo Spring Dairy, Inc.

Dairy Division sold milk to the Danish Cooperative Creamery, Fresno, California, through Ed and Steve Maddox. During the course of the Market Administrator's audit, the auditors were told that Ed and Steve Maddox would deduct five cents a hundredweight from the proceeds of the milk sold to Danish Cooperative Creamery for marketing the milk; the remainder would be passed over to Echo Spring Dairy, Inc. However, an audit of the account failed to indicate that the amount due Echo Spring Dairy, Inc. from Danish Cooperative Creamery, less the five cents a hundredweight, was deposited in the Echo Spring Dairy, Inc. account. The amounts entered into the Echo Spring Dairy, Inc. account often varied considerably from the amounts paid by Danish Cooperative Creamery for the milk. Although there were some adjustments made in various months, the amount of the adjustments for these discrepancies cannot be reconciled to the amounts Danish Cooperative Creamery paid for the milk. The payment of \$750,732.99 for milk delivered to Danish Cooperative Creamery for the months of January, February and March 1984 was not paid to Echo Spring Dairy, Inc. until May 7, 1984. In the absence of the money due from Danish Cooperative Creamery, the Dairy Division of Echo Spring relied on funds that were deposited in the Ru-Ann-Maddox Concentration account to pay their obligations.

16. Echo Spring continued to participate in the concentration account until mid-December of 1984, at which time it withdrew.

PERTINENT STATUTORY PROVISIONS

7 U.S.C. § 608c

(1) The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as 'handlers.' Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

(2) Orders issued pursuant to this section shall be applicable to (A) the following agricultural commodities . . . :
Milk . . .

* * * * *

(5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and . . . no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers:

(B) Providing:

* * * * *

(i) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

* * * * *

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection, providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed

in accordance with paragraph (A) of this subsection.

(13)(B) No order issued under this chapter shall be applicable to any producer in his capacity as a producer.

(15)(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

PERTINENT ORDER PROVISIONS

Pursuant to statutory powers, the Secretary of Agriculture has issued Milk Marketing Order No. 124 (7 CFR Part 1124) to regulate the handling of milk in the Oregon-Washington marketing area. The Order requires handlers to file monthly reports of receipts and utilization, and pay assessments to the producer-settlement fund, as well as assessments for the cost of the Order's administration (7 CFR §§ 1124.30, 1124.80, and 1124.87). However, a qualifying "producer-handler" is exempt from such obligations and is required to file only those reports that the Market Administrator may prescribe as necessary (7 CFR § 1124.32). Order 124 specifically defines a producer-handler:

§ 1124.12 Producer-Handler.

(a) "Producer-handler" means any person who operates a dairy farm and a milk processing plant from which there is route disposition in the marketing area during the month, and who receives no skim milk (including nonfat dry milk or condensed skim milk or skim milk recombined from nonfat dry milk or condensed skim milk) or butterfat

from any source, other than his own production, for use in fluid milk products during the month: Except that such person may purchase from other pool plants packaged fluid milk products, other than whole milk, in an amount not in excess of an average of 100 pounds per day during the month; and

(b) Such person must provide proof satisfactory to the market administrator that the care and management of all the dairy animals and other resources necessary to produce the entire volume of fluid milk products (excluding receipts from pool plants) and the operation of the processing and distribution business is the personal enterprise of and at the personal risk of such person.

CONCLUSIONS

1. The Market Administrator of Order 124 correctly determined that Echo Spring was not a producer-handler for the period of November 1983 through December 1984 because the care and management of all the dairy animals and other resources necessary to produce the entire volume of fluid milk was not the personal enterprise of and at the personal risk of Echo Spring.

2. The Market Administrator of Order 124 correctly determined that, from November 1983 through December 1984, Echo Spring was subject to full regulation under Order 124 as a pool plant; thereby owing the producer-settlement fund \$415,948.28 inclusive of late charges, and the administrative fund \$17,024.78, inclusive of late charges.

DISCUSSION

Until July 1, 1983, Echo Spring was fully regulated under Order 124 as the operator of the Eugene, Oregon, creamery which had the status of a "pool distributing plant." On July 1, 1983, in order to obtain "competitively-priced milk" (Pet. brief, at 2), Echo Spring leased from Maddox Dairy, Ltd., its dairy operation and herd in Burrel, California. Since then, Echo Spring has been an Oregon corporation consisting of two divisions, a creamery division located in Eugene, Oregon, and a dairy division located in Burrel, California. (Pet. brief, at 2).

Upon completion of the lease transaction in mid-1983, Maddox Dairy, Inc., became a 20% shareholder in Echo Spring, and Steve Maddox was hired and paid by Echo Spring to run its dairy division in Burrel, California. The books and records of the dairy division are kept in Riverdale, California, where its accounting proce-

dures are handled by Mr. Rick Stacy who, although an independent accountant, spends 100% of his working hours on the accounts of Maddox entities and, as part of these duties, handles the accounting procedures for Maddox Dairy-Division of Echo Spring. Approximately half of the milk produced at the dairy farm in Burrell goes to Echo Spring's creamery in Eugene, Oregon; the rest is sold, through Maddox, to Danish Cooperative Creamery in Fresno, California.

Mr. James Burger, Market Administrator of Order No. 124, was advised by Echo Spring of these arrangements and, by letter dated June 30, 1983, gave tentative approval to Echo Spring's request for designation as a producer-handler. In so doing, he was applying Order 124's very liberally written producer-handler provisions which provide a broad-based exemption from the Order's monetary obligations not typically available under other federal milk orders. It is axiomatic, however, that whenever a milk order's exemptive producer-handler provisions are applied, they are to be strictly construed. See *Andrew W. Leonberg*, 32 Agric. Dec. 763, 801 (1973). Therefore, when later apprised by his auditors that Maddox Dairy-Division of Echo Spring was participating with various Maddox entities in a concentration account form of banking which made the deposits of each participant available to fund the others and resulted in Maddox Dairy-Division of Echo Spring using money above its own generated income, the Market Administrator properly concluded that Echo Spring was not entitled to exemption as a producer-handler. Petitioner has argued that the Market Administrator's computations, showing Maddox Dairy-Division of Echo Spring to have used more money than it generated, fail to take into account various offsetting debits for obligations owed it by Maddox entities that participated in the concentration account. This argument, however, only confirms the fact that Echo Spring did not have control over the bank account of the dairy farm operation. Maddox employees had the power to dictate transfers among the eleven participating entities, and during the months studied by the Market Administrator and his auditors, unassigned funds of the ten participating Maddox entities were applied to service the banking needs of the Maddox Dairy-Division of Echo Spring, demonstrating that its operation was not at the personal risk of Echo Spring.

Order 124 specifically restricts producer-handler status to those who:

"... provide proof satisfactory to the market administrator that the care and management of all the dairy animals

and other resources necessary to produce the entire volume of fluid milk products (excluding receipts from pool plants) and the operation of the processing and distribution business is *the personal enterprise of and at the personal risk of such person.*" (7 CFR 1124.12(b); underscoring supplied).

Echo Spring complains that the Market Administrator's reading of this Order provision is far too literal and unduly restrictive. In point of fact, only a very expansive reading of the Order's language enabled the Market Administrator to initially determine that Echo Spring's operations met producer-handler standards. Nor is petitioner helped when all of the facts of its operations (see finding of fact 17) are examined in terms of the Act's objectives and those of Milk Order 124.

In authorizing the marketwide pooling of all proceeds on milk sales subject to a federal milk order's regulation, the Act seeks to establish the return of uniform weighted average prices to the producers who serve the regulated market's need for a stable supply of milk. Additionally, it seeks to maintain competitive equity among the market's milk handlers by requiring each to pay for milk at its value as used by each handler. These objectives of the Act are effectuated by requiring all regulated handlers, other than those qualifying under the producer-handler exemption, to make monthly payments into Order 124's producer-settlement fund. Handlers are further required to make monthly payments to the Order's administrative fund to equitably spread the cost of the Order's operations among them all.

Any handler selling milk to the market who is exempted from these payments gains advantage over his fully regulated competitors. Furthermore, producers lose the benefit of the exempted producer-handler's fluid milk sales in the calculation of monthly uniform and weighted average prices for their milk.

For these reasons, Order provisions exempting producer-handlers are, necessarily, narrowly construed. See *Leonberg, supra*. Whenever such an exemption is claimed in circumstances where it appears that more than one entity is involved in the movement of milk from cow to consumer, convincing proof is needed to negative the normal inference that a sale has taken place. Otherwise, those producers who faithfully serve the regulated market may be improperly deprived from sharing, as is their right, in the proceeds of all sales in the market, and competing handlers may suffer competitive disadvantage. Such proof has not been provided in this case.

Review of earlier cases interpreting producer-handler order provisions indicates that even if Echo Spring had not participated in a concentration account form of banking, it would be hard pressed to prove its entitlement to producer-handler exemption. See *Echo Spring Farm Inc. v. United States*, 127 F.2d 926 (1st Cir. 1942); *Cosgrove v. Wickard*, 49 F.Supp. 232 (D.Mass. 1943); *Andrew W. Leenberg, supra*; *Sherman Fitzgerald, o/b/a Sher-Von Dairy*, 31 Agric. Dec. 593 (1972); *Clyde Lisonbee, d/b/a Temple-View Dairy*, 31 Agric. Dec. 952 (1972); *Willow Crossing Dairy Farm, Inc.*, 29 Agric. Dec. 1007 (1970); *Fred B. Brown and Jennie Brown, d/b/a Gem Dairy*, 23 Agric. Dec. 18 (1964); *Eugene M. Olson*, 22 Agric. Dec. 877 (1963); *Independent Milk Producer-Distributors Associates*, 20 Agric. Dec. 1 (1961).

Under these circumstances, it cannot be said that the Market Administrator was arbitrary in concluding that the proof provided him was unsatisfactory and did not establish that the dairy farm operation in Burrell, California, was the personal enterprise of and at the personal risk of Echo Spring.

Petitioner has further argued that any monetary obligations that are imposed against it should be limited to those occurring after the Market Administrator issued his letter of September 28, 1984, in which he advised petitioner of its disqualification. However, the record shows that petitioner's participation in the concentration account, and the manner of its participation, was not brought to the Market Administrator's attention until an audit conducted in July 1984. He then properly studied the matter and after orally advising the petitioner of his concerns in August, he issued a timely written decision. To limit the assessments to the three months of October, November, and December of 1984, when the petitioner continued its practices in spite of the adverse determination by the Market Administrator, would stand justice on its head.

The following Order is therefore being entered.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Petitioner contends that the ALJ's findings are not supported by substantial evidence. But the record contains abundant evidence to support his findings. In addition, it is well settled that in a proceeding such as this, under § 8c(15)(A) of the Act, the burden of proof rests with petitioner. Petitioner has the burden of proving that the challenged obligations are "not in accordance with law" (7 U.S.C. § 608c(15)(A)).³

³ *Leaves Dairy, Inc. v. Freeman*, 461 F.2d 303, 316-17 (3d Cir. 1968), cert. denied, 394 U.S. 929 (1969); *Boonville Farms Coop., Inc. v. Freeman*, 358 F.2d 681, 682 (3d Cir. 1966).

Petitioner contends on appeal that the Market Administrator disavowed reliance on any circumstance other than the concentration account, in reaching his decision that petitioner did not qualify as a producer-handler under the Order. However, although the circumstances involving the concentration account were the strongest circumstances relied on by the Market Administrator, his decision was also based on other circumstances referred to by the ALJ (see, e.g., Tr. 848-55, 382-403).

Petitioner argues that the ALJ was biased against the producer-handler exemption. But there is nothing in the record to support that view. The ALJ merely followed the Department's well settled principle that the producer-handler exemption should be strictly construed.

For example, in *In re Leonberg*, 32 Agric. Dec. 763, 799-801 (1973), it is stated:

A producer-handler is exempt from payments into the producer-settlement fund on milk handled by him which payments represent, as indicated above, the amount by which the value of his milk at the class prices exceeds its value at the blend price. Obviously, a distinct economic benefit inures to a producer-handler under the Order, and the other dairy farmers who receive the uniform blended price do not share in the benefits from the producer-handler's Class I milk utilizations.¹⁰

¹⁰ The producer-handler exemption was sharply criticized in the *Report to the Secretary of Agriculture by the Federal Milk Order Study Committee*, p. 57 (1962), which states:

Historically, exemption from regulation has been given to certain handlers, particularly public-owned processors and producer distributors. Little justification exists today for exemption from regulation and only under the most unusual circumstances should such exemptions be granted.

If handlers were able to circumvent the requirements of the Order by employing spurious schemes to claim producer-handler status, it would bring chaos to the milk industry. As stated in Elm Spring Farm v. United States, 127 F.2d 920, 927 (C.A. 1):

Cir. 1966); *United States v. Mills*, 215 F.2d 828, 836, 838 (4th Cir.), cert. denied, 374 U.S. 802, 375 U.S. 819 (1963); *Windham Creamery, Inc. v. Freeman*, 230 F. Supp. 632, 635-36 (D.N.J. 1964), aff'd, 350 F.2d 978 (3d Cir. 1965), cert. denied, 382 U.S. 979 (1966); *Bailey Farm Dairy Co. v. Jones*, 61 F. Supp. 290, 217 (E.D. Mo. 1945), aff'd, 167 F.2d 87 (8th Cir.), cert. denied, 329 U.S. 788 (1946); *Wauwa Dairy Farms, Inc. v. Wickard*, 56 F. Supp. 67, 70 (E.D. Pa. 1944), aff'd, 149 F.2d 850, 862-63 (3d Cir. 1945).

The result inevitably would be that the whole regulatory scheme would break down. The maintenance of the uniform blended price to each producer, whether or not his milk goes predominantly into the fluid milk market, is impossible unless handlers who have more than the market average of fluid milk sales make the prescribed equalization payments into the pool. The Act and the Order seek to achieve a fair division of the more profitable fluid milk market among all producers, thereby eliminating the disorganizing effects which had theretofore been a consequence of cut-throat competition among producers striving for the fluid milk market. This is clearly set forth in the opinion in *United States v. Rock Royal Co-operative, Inc.*, 1939, 307 U.S. 533, 548, 550, 59 S. Ct. 993, 83 L. Ed. 1446.

While the Secretary could have elected to fully regulate producer-handlers (*Freeman v. Vance*, 319 F.2d 841, 842 (C.A. 5), certiorari denied, 377 U.S. 930; *Ideal Farms, Inc. v. Benson*, 288 F.2d 608, 618 (C.A. 3), certiorari denied, 372 U.S. 965), he has not done so in this Order. But producer-handler status is an exception to the general regulatory scheme of the Act, and as such it must be strictly construed, and must be established by a handler seeking the exception. See *Trade Comm'n v. Morton Salt Co.*, 334 U.S. 37, 44-45; *Phillips Co. v. Walling*, 324 U.S. 490, 493; *Schlemmer v. Buffalo, Rochester & Ry.*, 205 U.S. 1, 10; *Detroit Edison Co. v. Securities & Exchange Commission*, 119 F.2d 730, 739 (C.A. 6), certiorari denied, 314 U.S. 618; *Shilke v. Musicraft Records*, 131 F.2d 929, 931 (C.A. 2), certiorari denied, 319 U.S. 742. The burden of proof is upon the petitioner to show that the Market Administrator's determination that it is not entitled to the producer-handler exemption is not in accordance with law (see citations immediately above; and *Lewis Dairy, Inc. v. Freeman*, 401 F.2d 308, 316-317 (C.A. 3), certiorari denied, 394 U.S. 929; *Boonville Farms Cooperative, Inc. v. Freeman*, 358 F.2d 681, 682 (C.A. 2); *Windham Creamery, Inc. v. Freeman*, 230 F. Supp. 632, 635-636 (D.N.J.), affirmed, 350 F.2d 978 (C.A. 3), certiorari denied, 382 U.S. 979; *Bailey Farm Dairy Co. v. Jones*, 61 F. Supp. 209, 217 (E.D. Mo.), affirmed, 157 F.2d 87 (C.A. 8), certiorari denied, 329 U.S. 788; *Wawa Dairy*

Farms v. Wickard, 56 F. Supp. 67, 70 (E.D. Pa.), affirmed, 149 F.2d 860, 863 (C.A. 3).

Claims to producer-handler status have been frequently litigated because of the economic benefits resulting therefrom and because of the variety of schemes and devices handlers have employed to claim producer-handler status. As was stated in *In re Independent Milk Producer-Distributors Association*, 20 Agriculture Decisions 1, 28 (1961):

The regulatory scheme set forth in such section is merely an attempt to prevent the evasion or circumvention of the distinction established in the order between producer-handlers and handlers by methods employed in the past or those that could be reasonably anticipated. In the past, elaborate and ingenious schemes have been employed to achieve apparent producer-handler status and thus to circumvent regulation. See, e.g., *Elm Spring Farm, Inc. v. United States*, 127 F.2d 920 (1st Cir. 1942); *In re Martin & Costa*, 4 A.D. 636 (1945); *In re John Velazo*, 5 A.D. 739 (1946), and cases cited therein.¹¹

¹¹ See, also, *Brown v. United States*, 367 F.2d 907, 910-911 (C.A. 10), certiorari denied, 387 U.S. 917; *Cusgrave v. Wickard*, 49 F. Supp. 232, 233-238 (D. Mass.).

For this reason, and by virtue of the fact that producer-handler status represents a defined and circumscribed exemption from or exception to regulation, the producer-handler definition of Order No. 36 (7 CFR 1036.14) should be strictly construed and strictly complied with to achieve such exemption.

The same principle was applied in *In re Associated Milk Producers, Inc.*, 33 Agric. Dec. 976, 982-98 (1974), in affirming a decision by a Market Administrator that a dairy lost its producer-handler status for a month in which it gratuitously stored one tanker of milk for another milk company as a "courtesy." In affirming the Market Administrator's determination, the Judicial Officer stated (33 Agric. Dec. at 985-86):

The loss of the petitioner's "producer-handler" exemption for the month of July 1972 in the circumstances of this case is a very harsh and unfortunate result. Although the petitioner was contractually obligated to supply milk to Flagstaff Milk Company, and petitioner stored the milk

for Flagstaff when it could not fulfill its contractual obligation, there is no evidence that Flagstaff would have sought damages from petitioner for its failure to meet its contractual obligation. Moreover, petitioner saved Flagstaff only \$200 or \$300 by storing the milk. On the other hand, petitioner lost its "producer-handler" status for the month, which cost it about \$7,500. Obviously, neither the petitioner nor Flagstaff contemplated the effect of the storage on petitioner's "producer-handler" status.

The storage occurred when the petitioner's President was out of town. As stated by the Administrative Law Judge (Initial Decision, p. 6):

The simple fact is, Petitioner is a relatively inexperienced producer-handler whose operating personnel entered into this arrangement to assist one of their customers with no realization of the possible legal consequences that might flow from it. It was a mistake.

However, the Market Administrator has no authority to amend the Order to protect a handler from the consequences of unwise or mistaken action. It is the duty of the Market Administrator to "[a]dminister the order in accordance with its terms and provisions" (7 CFR 1000.3(b)(1)). Any amendments must come from the Secretary of Agriculture—not the Market Administrator. 7 U.S.C. 608c(1). See, also, *Foster v. Freeman*, 271 F. Supp. 33, 38-39 (S.D.N.Y.); *In re Heber Valley Milk Company*, 31 Agriculture Decisions 1319, 1332 (1973), affirmed, *Heber Valley Milk Co. v. Butz*, 32 Agriculture Decisions 1630 (D. Utah), reversed and remanded because of inadequate District Court findings, No. 73-1725 (C.A. 10), decided June 26, 1974 [*aff'd*, No. C-354-72 (D. Utah Dec. 9, 1974) (decision on remand), printed in 34 Agric. Dec. 45 (1975)]. If the Order produces inequitable or harsh results, the remedy is by means of an amendment to the Order by the Secretary. Until the Order is amended, the plain terms of the Order must be followed.³

³ An amendment to permit petitioner to retain "producer-handler" status for July 1972 in the circumstances of this case would not appear administratively desirable, see, *infra*.

If the Market Administrators of approximately 60 milk Orders, regulating over \$4 billion worth of milk annually,

had the power to alter the terms of the Orders to effectuate what they regarded as equity in each case, the entire regulatory program would break down. Also, suspicions would arise that their views were influenced by extraneous factors such as friendship, political affiliation, campaign contributions, etc.

In the *Associated Milk* case, just discussed, the great weight to be given to the Market Administrator's interpretation of the Order is stated as follows (32 Agric. Dec. at 982-83):

The Market Administrator charged with the responsibility of enforcing the Order interpreted the word "[r]eceives" in accordance with its normal, dictionary definition. His interpretation is entitled to great weight. *Lawson Milk Company v. Freeman*, 358 F.2d 647, 650 (C.A. 6); *Allen M. Campbell Co. Gen. Con., Inc. v. Lloyd Wood Const. Co., Inc.*, 446 F.2d 261, 265 (C.A. 5). See, also, *Udall v. Tullman*, 380 U.S. 1, 16-17; *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 413-414; *Federal Comm'n v. Broadcasting Company*, 309 U.S. 134, 143, fn. 6; *Norwegian Nitrogen Co. v. United States*, 288 U.S. 294, 335; *United Truck Lines v. Interstate Commerce Commission*, 189 F.2d 816, 817 (C.A. 9), certiorari denied, 342 U.S. 830; *L. Gillarde Co. v. Joseph Martinelli & Co., Inc.*, 169 F.2d 60, 60-61 (C.A. 1), certiorari denied, 335 U.S. 885; *Armstrong Co. v. Walling*, 161 F.2d 515, 517 (C.A. 1); *Superior Packing Co. v. Porter*, 156 F.2d 193, 195 (C.A. 8), certiorari denied, 329 U.S. 788; *Bowles v. Mannie & Co.*, 155 F.2d 129, 133 (C.A. 7), certiorari denied, 329 U.S. 736; *Bowles v. Cudahy Packing Company*, 154 F.2d 891, 892 (C.A. 3); *In re Yosgur Farms, Inc.*, 33 Agriculture Decisions 389, 417-418 (1974); *In re Weissglass Dairy Corporation*, 32 Agriculture Decisions 1004, 1055 (1973), affirmed, *Weissglass Gold Seal Dairy Corporation v. Butz*, 360 F. Supp. 632 (S.D.N.Y.).

The doctrine of affording considerable weight to the Administrator's interpretation is particularly applicable in the field of milk. As stated by the Court in *Queensboro Farms Products v. Wickard*, 137 F.2d 969, 980 (C.A. 2):

The Supreme Court has admonished us that interpretations of a statute by officers who, under the statute, act in administering it as specialists advised by experts must be accorded considerable weight by the courts. If ever there was a place for

that doctrine, it is, as to milk, in connection with the administration of this Act because of its background and legislative history. The Supreme Court has, at least inferentially, so recognized.

For the foregoing reasons, the Market Administrator's designation should be upheld, and the petition should be dismissed.

ORDER

The petition is hereby dismissed and the relief requested thereon is denied.

In re: KENNETH BURDETTE and JAMES BURDETTE. A.Q. Docket No. 167. Decided January 22, 1986.

Interstate movement of cattle.

Kris Hejiri, for complainant.

Kent O. Hyde, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Act of February 2, 1908, as amended, (Act) (21 U.S.C. Section 111 and Section 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Kenneth Burdette and James Burdette violated the Act and regulations promulgated thereunder (9 CFR Section 71.1 *et seq.* and Section 78.1 *et seq.*) Respondent Kenneth Burdette and the complainant have agreed that this proceeding should be terminated by entry of the Consent Decision set forth and have agreed to the following stipulations:

1. For the purpose of this stipulation and the provisions of this Consent Decision only, respondent Kenneth Burdette admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent Kenneth Burdette also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. Section 504 *et seq.*) for fees and other expenses incurred by him in connection with this proceeding.

FINDINGS OF FACT

1. Kenneth Burdette, respondent, is an individual whose address is Route 1, Pleasant Hope, Missouri 65725.

2. On or about July 11, 1984, the respondent moved interstate from Pleasant Hope, Missouri, to Lamar County, Texas, approximately five cattle.

CONCLUSIONS

Respondent, Kenneth Burdette having admitted the jurisdic-
tional facts and having agreed to the provisions set forth in the
Decision and Order in disposition of this proceeding, such Order and
Decision will be issued.

ORDER

Respondent Kenneth Burdette is assessed a civil penalty of
thousand five hundred dollars (\$1,500.00) which shall be payable to
the "Treasurer of the United States", by certified check or money
order, and which shall be forwarded to Kris H. Ikejiri, Office of
General Counsel, Room 2422 South Building, United States Depart-
ment of Agriculture, Washington, D.C. 20250-1400, within
(30) days from the effective date of this Decision and Order.

This Decision and Order shall become effective on the day of
service upon the respondent.

In re JOHN A. EASTWOOD. A.Q. Docket No. 157. Decided Jan
27, 1986.

Interstate movement of brucellosis-exposed cattle.

Reynold A. Cipolletti, for complainant.
Respondent, *pro se*.

Decision by Dorothea A. Baker, Administrative Law Judge.

DEFAULT DECISION AND ORDER

PRELIMINARY STATEMENT

plaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer to, or plead specifically to, any allegation in the complaint would constitute an admission of such allegation pursuant to section 1.141 of the Rules of Practice (7 CFR § 1.141), and a waiver of such hearing. The letter also advised the respondent that failure to request an oral hearing within the time for filing an answer would constitute a waiver, on his part, of oral hearing. Respondent has failed to respond in any manner to allegations in the complaint and respondent has not requested an oral hearing. There is some indication in the file that, before the General Counsel, the Respondent was represented by an Attorney. However, no written entry of appearance has been made herein.

Respondent's failure to deny or otherwise respond to the allegations in the complaint constitutes an admission of such allegations, pursuant to section 1.136(c) of the Rules of Practice (7 CFR § 1.136(c)). Respondent's failure to request a hearing constitutes a waiver of such hearing. There being no basis for a hearing, the material allegations of fact in the complaint are adopted and set forth as the Findings of Fact.

FINDINGS OF FACT

1. John A. Eastwood, herein referred to as the respondent, is an individual whose mailing address is Box 141, Boswell, Oklahoma 74727.

2. On or about June 29, 1983, the respondent moves interstate 39 head of brucellosis exposed cattle from Boswell, Oklahoma, to Texarkana, Texas, in violation of section 78.8(a)(2) of the regulations (9 CFR § 78.8(a)(2)) in that the cattle were not accompanied by a VS Form 1-27 permit or an "S" brand permit, as required.

3. On or about June 29, 1983, the respondent moved interstate 39 head of brucellosis exposed cattle from Boswell, Oklahoma, to Texarkana, Texas, in violation of section 78.8(a)(3) of the regulations (9 CFR § 78.8(a)(3)) in that the cattle were not "S" branded, as required.

4. On or about June 29, 1983, the respondent moved interstate 39 head of brucellosis exposed cattle from Boswell, Oklahoma, to Texarkana, Texas, in violation of section 71.18(a)(1)(ii) of the regulations (9 CFR § 71.18(a)(1)(ii)) in that the cattle were not accompanied by an owner's or shipper's statement or other document, as required.

CONCLUSION

Respondent has failed to respond in any manner to the allegations of the complaint. By reason of the Findings of Fact set forth above the respondent has violated the Act and the regulations promulgated thereunder. Therefore, the following order is issued.

ORDER

Respondent John A. Eastwood is hereby assessed a civil penalty of three thousand dollars (\$3,000). The respondent shall send, payable to the "Treasury of the United States" a certified check or money order, to Mark D. Dopp, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20260-1400, not later than thirty (30) days from the effective date of this order. This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[The Default Decision and Order became final on January 21, 1986.—Ed.]

In re: BILL JOHNSON d/b/a BILL JOHNSON CATTLE COMPANY, and
EDGAR L. HOLCOMB. A.Q. Docket No. 158. Decided January 28,
1986.

Interstate movement of cattle.

Mark Dopp, for complainant.

Respondent, pro se.

Decision by Dorothea A. Baker, Administrative Law Judge.

DEFAULT DECISION AND ORDER

PRELIMINARY STATEMENT

This proceeding was instituted under the Act of February 2, 1903, as amended, (Act) (21 U.S.C. §§ 111 and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that the respondent Edgar Holcomb violated sections 78.3(b) and 78.8(a)(2) of the regulations promulgated thereunder (9 CFR §§ 78.3(b) and 78.8(a)(2)). Copies of the complaint and the Rules of Practice Governing Proceedings Under the Act were served by

the Hearing Clerk, by certified mail, upon respondent Edgar Holcomb.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) applicable to this proceeding, respondent Edgar Holcomb was informed in the complaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer to, or plead specifically to, any allegation in the complaint would constitute an admission of such allegation pursuant to section 1.141 of the Rules of Practice (7 CFR § 1.141), and a waiver of such hearing. The letter also advised the respondent Edgar Holcomb that failure to request an oral hearing within the time for filing an answer would constitute a waiver, on his part, of oral hearing. Respondent Edgar Holcomb has failed to respond in any manner to allegations in the complaint and respondent Edgar Holcomb has not requested an oral hearing.

Respondent Edgar Holcomb's failure to deny or otherwise respond to the allegations in the complaint constitutes an admission of such allegations, pursuant to section 1.136(c) of the Rules of Practice (7 CFR § 1.136(c)). Respondent Edgar Holcomb's failure to request a hearing constitutes a waiver of such hearing. There being no basis for a hearing, the material allegations of fact in the complaint are adopted and set forth as the Findings of Fact.

FINDINGS OF FACT

1. Edgar L. Holcomb, herein referred to as a respondent, is an individual whose mailing address is General Delivery, Ft. Deposit, Alabama.

2. On or about September 27, 1984, the respondent Edgar L. Holcomb moved one (1) bull from Montgomery, Alabama, to Brookville, Indiana, in violation of section 78.8(a)(2) of the regulations (9 CFR § 78.8(a)(2)) in that the bull was not accompanied by a VS Form 1-27 permit or an "S" brand permit, as required.

3. On or about September 27, 1984, the respondents moved one (1) bull from Montgomery, Alabama, to Brookville, Indiana, in violation of section 78.3(b) of the regulations (9 CFR § 78.3(b)) in that the bull was not accompanied by a permit, as required.

CONCLUSION

Respondent Edgar L. Holcomb has failed to respond in any manner to the allegations of the complaint. By reason of the Findings of Fact set forth above the respondent Edgar L. Holcomb has violated the Act and the regulations promulgated thereunder. Therefore, the following order is issued.

ORDER

Respondent Edgar L. Holcomb is hereby assessed a civil penalty of one thousand dollars (\$1000). The respondent Edgar L. Holcomb shall send, payable to the "Treasury of the United States" a certified check or money order, to Mark D. Dopp, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250, not later than thirty days from the effective date of this order. This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent Edgar Holcomb, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[The Default Decision and Order became final on January 2, 1986.—Ed.]

In re: JAMES GRADY, PATRICK J. GRADY and ROSEMARY GRADY. AQ Docket No. 54. Decided January 31, 1986.

Violation of regulations governing interstate cattle movement. The Judicial Officer affirmed Judge McGrail's order assessing civil penalties totaling \$29,000 for violating the regulations governing the interstate movement of cattle to prevent the spread of brucellosis. Respondents failed to have a statement or other document showing prescribed information accompanying their cattle interstate, failed to have a health certificate, and failed to have cattle identified by a tagging or other approved identification. Intrastate health certificates lack the detail required for interstate movement. Respondents' failure to testify gives rise to the inference that their testimony would have been adverse. Even if respondents could have shown that the regulations were not scrupulously followed in other cases, that would not be a defense here.

Thomas E. Brady, for complainant.

Warren L. Bash, for respondents.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is an administrative proceeding for the assessment of civil penalties for violations of the regulations governing the interstate movement of cattle to prevent the spread of brucellosis (9 CFR §§ 71.18, 78.9). An initial Decision and Order was issued on September 26, 1985, by Administrative Law Judge Edward H. McGrail (ALJ) assessing civil penalties totalling \$29,000.

On October 28, 1985, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's

cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.35).¹ The case was referred to the Judicial Officer for decision on November 29, 1985.

Based upon a careful consideration of the record, the initial Decision and Order is adopted as the final Decision and Order in this case (with a few changes too trivial to be itemized), except that the effective date of the order is changed in view of the appeal. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

PRELIMINARY STATEMENT

This is an administrative proceeding instituted by a complaint filed on March 15, 1984, by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, seeking assessment of civil penalties against respondents under the Act of February 2, 1903, as amended, 21 U.S.C. §§ 111 and 120, and the regulations promulgated thereunder (9 CFR §§ 71.18 and 78.9). An amended complaint was filed on October 2, 1984, pursuant to the Rules of Practice, 7 CFR § 1.130 *et seq.*

The amended complaint alleges thirty-one (31) violations involving interstate movement of cattle during the period March 11, 1983, through December 4, 1983. All violations involved interstate movement of cattle to or from the State of Iowa, a Class A State, without being accompanied by a certificate or other document showing prescribed information as required by the pertinent regulations, specifically 9 CFR §§ 71.18, 78.9(b)(3)(ii) and 79.9(c)(3)(ii). Respondent James Grady is cited for twenty (20) violations; respondent Patrick J. Grady is cited for six (6) violations; respondent Rosemary Grady is cited for two (2) violations; and respondents James Grady and Patrick J. Grady are jointly cited for three (3) violations.

Answer to the original complaint was filed by respondents on March 15, 1984, denying all material allegations. In answer to the amended complaint, filed by respondents on October 21, 1984, all allegations were again denied, as well as paragraph (c) citing Rose

¹ The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450gl, and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 1219 (1953)), reprinted in 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

Mary Grady as a respondent. However, whereas counsel respondents filed the original answer as a representative for Grady, Patrick J. Grady and Rose Mary Grady, the answer amended complaint was filed as representative of James Patrick J. Grady and Rose Mary Kryszakakis.

Oral hearing was held before the undersigned Administrative Law Judge on May 7-9, 1985, at Sioux City, Iowa. Complainant represented by Thomas E. Bundy, Esq., and Kevin Thiemann, Office of General Counsel, U.S. Department of Agriculture, Washington, D. C. Respondents were represented by Warren L. L. Esq. Wall Lake, Iowa. Simultaneous briefs were requested filed on or before July 10, 1985 and reply brief on or before July 1985. Complainant's brief was filed on July 10, 1985. Respondent's brief was not filed until July 16, 1985. A reply brief was filed on or before July 30, 1985, by complainant. However, no reply brief was filed on behalf of respondents.

STATEMENT OF LAW

Generally, Title 21 of the United States Code, § 122, provides the assessment of civil penalties for the violation of regulations issued pursuant to authority invested in the Secretary of Agriculture in Sections 111 and 120 of Title 21 of the United States Code. Sections 111 and 120 of Title 21, United States Code, authorize the Secretary to promulgate such regulations as to prevent the introduction, dissemination, or spread of contagious animal diseases through interstate movements of cattle.

Sections 71.18, 78.9(b)(3)(ii) and 78.9(c)(3)(ii) of the regulations promulgated by the Secretary pursuant to the above authority require that cows over twenty-four months of age or parturient or postparturient from herds not known to be affected by brucellosis, and moved other than directly to slaughter or to a quarantined feedlot must be accompanied on an interstate movement by a statement or other document showing prescribed information and a health certificate, and be individually identified with a U.S. Department of Agriculture prescribed tag or other approved identification. For ready reference the specific sections of these regulations, as well as Sections 111, 120, and 122 of Title 21, United States Code, are set forth in Appendix A hereto.

The States of Iowa, South Dakota and Nebraska are Class A states, as designated by 9 CFR 78.20(b). The area of Montana which includes Valley County (Hinsdale) was a Class A area at the time of the movement in question, as designated by 9 CFR 78.20(b). The State of Oklahoma is a Class B state, as designated by 9 CFR 78.20(c).

FINDINGS OF FACT AND CONCLUSIONS

General Findings

So that repetition may not burden the length of these findings, certain General Findings pertaining to two or more of the allegations of the amended complaint are set forth as follows:

1. The record does not clearly show whether each of the respondents own or operate individual farms at Dunlap, Iowa. It is therefore assumed that there is one "Grady" farm at Dunlap, Iowa, which was used by all respondents for the interstate movement of the cattle involved herein.

2. The records of the South Dakota Livestock Sanitary Board, Pierre, South Dakota (Board) were searched for the period March to September 1983 by experienced personnel of the Board and by Mr. George Crowell, Compliance Officer, U.S. Department of Agriculture, to determine whether any health certificates consigning cattle owned by James Grady, Patrick Grady or Rose Mary Grady from any point in Iowa to any point in South Dakota had been received by the Board. A negative reply, dated January 11, 1984, was received from Dr. D. E. Hughes, State Veterinarian and Executive Secretary of the Board. The search by Mr. Crowell also proved negative. These records were not searched for the name Rose Mary Kryeakakis (CX-91; Tr. 373-375).¹

3. The records of the Iowa Department of Agriculture, Division of Animal Industry, Des Moines, Iowa (Department) were caused to be searched by experienced personnel of that Department to determine if any health certificate had been issued to James Grady, Patrick Grady, Wendell Grady or Rose Mary Grady for the importation of cattle into the State of Iowa, or the export of cattle from Iowa to the States of Minnesota, South Dakota and Nebraska during the year 1983. This Division is the repository for copies of health certificates issued by accredited veterinarians for the interstate movement of cattle. When cattle are moved from Iowa, a copy of the health certificate is forwarded to the destination state. In turn, Iowa receives a copy of any health certificate from the origin state when Iowa is the destination state. These searches failed to show any health certificates issued in any of these names for the interstate movement of cattle in the year 1983. The name Rose Mary Kryeakakis was not searched through these records (CX-60-61; Tr. 303-308, 309-313).

¹ Reference to exhibits are designated "CX" and "RX" to indicate those submitted by complainant and respondent respectively. References to the hearing transcript are designed "Tr."

4. Brucellosis is an infectious, contagious, communicable disease of livestock which can also infect humans. In livestock it is considered a reproductive disease which causes abortions, weak or still born calves, and a decrease in milk production of the cows. Additionally, it can cause undulant fever in humans who come in contact with infected livestock. Nationwide, production losses to the livestock industry due to brucellosis infected cattle has been estimated as approximately \$30 million per year (Tr. 10-11, 17).

5. The overall aim of regulations governing the interstate movement of cattle is to eradicate such animal diseases as brucellosis and tuberculosis in order to reduce and prevent losses to the livestock industry. They also provide protection to the receiving state and to a buyer of livestock against the introduction of such infectious diseases into the herds of the state and the individual. Specifically, the prescribed metal ear tag enables authorities to trace the animal back to its source and identify other animals that have been associated with that animal in its travel (Tr. 9, 431-432).

6. Test eligible animals, subject to the regulations and moving from a Class A or B state, are designated by age or as parturient or postparturient. A parturient cow refers to one showing visible signs of approaching parturition, or calving, or within two weeks of calving. Postparturient refers to a cow that has given birth to a calf. The usage of the term "cow/calf pairs" implies in the language of the industry, a cow and a calf born of that same cow. They are in fact a pair (Tr. 16-18, 429).

One method of determining the age of a cow is by a mouth inspection of its teeth. However, an experienced person may also determine the age of a cow from physical changes which take place in a cow in proceeding through the various stages of growth. Such changes include the addition or loss of teeth, the widening of the mouth as additional teeth are formed, the formation of a longer head, bone structure changes in the body, development of the udder after calving and weight (Tr. 67-68; 103-104; 115-116; 130-132).

7. In 1983, there were some Simmental cattle at the Grady farm; however, it was unknown as to whether or not they were registered. The only testimony or documents of record relating to purebred cattle is that relating to the Limousin breed (RX-9, Tr. 465, 500, 514-515). There is no evidence of record which shows that the requirements for classifying Simmental cattle are the same as those required for classifying Limousin cattle. Generally, a tattoo in a cow's ear is not recognized by a purebred association unless a certificate has been issued by that association. The registered certificate should accompany these cattle. Without the registration

certificate, the tattoo would not be recognized as anyone with a tattoo iron could tattoo any cow.

The record fails to show that any of the cattle shipped by respondents were accompanied by a purebred association certificate. To the contrary, it has been shown that the cattle shipped were crossbred cows (CX-13, 18, 31, 68, 74; Tr. 40-42; 93-94; 124-129; 219; 229-230; 240-244; 321; 354; 384-385).

Specific Findings

As with the counts of the complaint the below listed findings will be treated *seriatim*.

I

(a) Respondent Patrick J. Grady is an individual whose mailing address is Dunlap, Iowa 51529.

(b) Respondent James Grady is an individual whose mailing address is Dunlap, Iowa 51529.

(c) Respondent Rose Mary Grady is an individual whose mailing address is 7703 Cedarwood Circle, Boca Raton, Florida 33432. She is the same individual identified in the record as Rose Mary Kryeakakis.

II-III

Mr. Leslie Pedersen, Denison, Iowa, provided an affidavit showing that on March 11, 1983, while an employee of Les Brown Trucking, he loaded 54 cows at the Wendell Grady farm, Dunlap, Iowa, transported them to a weighing station at Dunlap, Iowa, then transported them to Donald Vogt's farm near Blair, Nebraska. He could not recall having been provided any certificates by the Gradys to accompany the cattle. The only document he was provided was an invoice for the price of the cattle which he gave to Mr. Donald Vogt upon delivery. Mr. Vogt gave him a check made out to Pat Grady for the cost of the cattle which he gave to Pat Grady. Mr. Vogt paid for the cost of transportation of the cattle from Dunlap, Iowa, to Blair, Nebraska (CX-50; Tr. 267).

An affidavit of Mr. Donald J. Vogt, a farmer and cattle feeder, Rte. 1, Blair, Nebraska, obtained by a compliance officer, Agriculture Veterinary Service, U.S. Department of Agriculture (USDA), stated that on or about March 11, 1983, he received a shipment of 54 cows, all over two years of age, at his farm in Blair, Nebraska, from the Grady farm, Dunlap, Iowa. He had previously examined these cows at the Grady farm and was told they had been pregnancy tested and were all open. Almost all of the cows had had at least one calf, and four or five of the cows had calves soon after he received them.

This shipment of cows was first taken to Dunlap, Iowa, to weighing after which Mr. Vogt agreed to purchase the cows. The Gradys made the arrangements for the Les Brown Trucking Company to transport these cows to Dunlap, Iowa, and later to Mr. Vogt's farm in Blair, Nebraska. The Gradys paid for the trucking into Dunlap, Iowa and Mr. Vogt paid for the trucking from Dunlap, Iowa to his farm in Blair, Nebraska. The check for the cows was either sent back with the truck or it was mailed. Mr. Vogt did not receive a health certificate when the cows were delivered. The only document he received was an invoice showing the number of cows delivered, the price per hundredweight and the total dollar amount due (CX-27; Tr. 163).

Mr. Maurice Partridge, former compliance officer, Agriculture Veterinary Service, USDA, now retired, while on active duty obtained a copy of the invoice from Mr. Vogt which showed that the 54 cattle weighed a total of 41,935 pounds and, at \$52.50 per hundredweight, Mr. Vogt paid a total of \$22,015.88. From this amount, \$72.00 was deducted for the cost of transportation from Dunlap, Iowa, to Blair, Nebraska, leaving a total of \$21,943.88 as the amount to be paid to Pat Grady for these cattle (CX-25; Tr. 162).

Mr. Partridge also obtained from Mr. Vogt a copy of a sight draft dated March 11, 1983, paid to the order of Pat Grady in the amount of \$21,943.88 for 54 heifers at \$52.50 per hundredweight. The buyer was listed as Donald H. Vogt. The sight draft was drawn on the Washington County Bank of Air, Nebraska, endorsed by, and deposited in the account of Pat Grady (CX-26; Tr. 162).

The above facts are not rebutted in this record. The 54 parturient/postparturient cows were moved from the Grady farm, Dunlap, Iowa, to Mr. Vogt's farm at Blair, Nebraska, an interstate movement. Mr. Pedersen, the truck driver who delivered the cattle, was not provided an owner's statement nor a health certificate to accompany the cattle. He was only given an invoice listing the amount of money to be paid for the cattle. Such invoice does not comply with the requirements of § 71.18. Documents of record show that the invoice was issued by Pat Grady, and that payment for the cattle was made to, and acknowledged by check endorsement by Pat Grady. See also General Findings 2 and 3, *supra*.

Nor can respondent Patrick Grady claim that this movement, without the required certificate, comes within the exceptions set forth in § 78.9(b)(3)(iii) or 78.9(b)(3)(iv) since the Grady farm cannot be considered a "Farm of Origin", as defined in § 78.1(dd). The record shows that it was a place where purchased cattle were assembled for sale. Moreover, § 79.9(b)(3)(iv) provides the exception only when there is an interstate movement of cattle without

change of ownership to another premise belonging to the same owner. The latter was not the situation here since the cattle were moved to Mr. Vogt's farm.

Therefore, it must be found that Patrick Grady moved, or caused to be moved interstate, 54 parturient/postparturient cows over 2 years of age, from Dunlap, Iowa, to Blair, Nebraska, without being accompanied by an owner's statement or other document in violation of § 71.18, and without a certificate, as defined in § 78.1(n), in violation of § 78.9(b)(3)(ii).

IV

Mr. Dan Snyder, Sr., Atkinson, Nebraska, is a livestock trucker in partnership with his sons, Melvin, Danny and Clifton, and his son-in-law, Les Nelson, operating under the name Snyder Trucking. During 1983, he received a number of calls from Pat Grady for need of a truck to transport cattle. Upon receipt of such a call he would contact one of his sons, or son-in-law, whoever was available, to respond to Pat Grady's request. The information concerning the dates of trips and who transported a specific load was provided him by his sons and son-in-law (CX-4; Tr. 46-47).

Mr. Danny D. Snyder, Jr., Atkinson, Nebraska, is the son of Dan Snyder, Sr., and is a driver for Snyder Trucking. On May 23, 1983, Pat Grady helped him load 43 cows, 4 bulls, and 34 calves from the Grady farm in Dunlap, Iowa to be delivered to the Kehn Ranch, St. Charles, South Dakota. Pat Grady, who was the owner of the cattle, gave him a sealed envelope which he assumed contained the health papers to accompany the cattle. Mr. Snyder delivered the cattle to a pasture location at the Kehn Ranch, Inc., St. Charles, South Dakota (Tr. 56-60; CX-5, 7).

Mr. Edwin C. Kehn is a rancher, who operates Kehn Ranch, Inc., St. Charles, South Dakota. Kehn Ranch grazes livestock in its pastures for a fee. Mr. Kehn has had conversations with Jim Grady but the bulk of his business has been with Pat Grady. On May 23, 1983, he received a shipment of cattle from Pat Grady, Dunlap, Iowa, consisting of 34 cow/calf pairs, 9 heifers and 4 bulls, a total of 81 cattle to be let out in his pasture for the grazing season. The cattle were delivered by Danny D. Snyder of Snyder Trucking who acknowledged on a Kehn Ranch "Cattle Kit" form that he had delivered a total of 81 cattle consisting of the 34 cow/calf pairs, 9 heifers and 4 bulls. Mr. Kehn was only given a bill of lading by Danny Snyder, whereas he also expected to receive the necessary health papers for these cattle. When Mr. Kehn contacted Pat Grady about health papers, Pat Grady advised that they would be forthcoming but Mr. Kehn never received them (CX-8).

On May 24, 1983, Pat Grady and Mr. Kehn signed an agreement whereby Mr. Kehn agreed to pasture at his ranch the above 3 cow/calf pairs, 4 bulls and 9 yearling heifers owned by Pat Grady. At the same time, Pat Grady issued a check to Mr. Kehn in the amount of \$1,150.00 for the services provided by Mr. Kehn. The cattle were placed in a separate pasture on Mr. Kehn's ranch, and remained there throughout the grazing period.

While the cattle were still in pasture at the Kehn Ranch, an agent from the South Dakota State Livestock Sanitary Board (Sanitary Board) contacted Mr. Kehn regarding health papers on the cattle shipped by Pat Grady to the Kehn ranch. The agent was advised by Mr. Kehn that no health papers for the cattle were provided by Pat Grady. Later, Mr. Kehn was visited by another agent from the Sanitary Board inquiring about the health papers for the Pat Grady cattle. Since none were provided by Pat Grady, the agent issued a citation, dated October 17, 1983, in the name of Patrick J. Grady, notifying him that his cattle were quarantined for lack of a health certificate. These were the same Pat Grady cattle Mr. Kehn received on May 23, 1983 (CX-5, 40-42; Tr. 227-237).

Mr. Kehn believed that possibly one of the cows could be a purebred cow but that the others were crossbreeds. However, he believed if any of the cattle were purebred, Pat Grady would have identified them. Mr. Kehn would also want to know about them for purposes of insurance (CX-43-46; Tr. 239-251).

His opinion as to what type of cows they were was based on their appearance, and the fact that if they were purebred such would certainly show up in the calves. Such purebred characteristics and markings did not show in the calves involved. Additionally, the calves would be more valuable, have been registered, and have been accompanied by the necessary purebred papers. Further, it has been his experience that a purebred calf not only bears an ear tattoo but also a metal tag for identification to match up with the mother cow. None of the calves had metal ear tags, nor did several of the calves he examined have ear tattoos.

From the record, it is readily apparent that 34 cow/calf pairs were moved from the Grady farm, Dunlap, Iowa, to the Kehn Ranch, St. Charles, South Dakota, an interstate movement. It is equally apparent that the 34 cow/calf pairs were owned by Patrick Grady, and were moved by him interstate for the purpose of grazing them on land owned by the Kehn Ranch. The signed agreement shows that the fee paid by Patrick Grady was for grazing and other services to be provided and was not a lease for the grazing land. That the required certificate for the interstate transportation of these cattle was never obtained, or provided, is attested to by the

citation issued by the Sanitary Board of the State of South Dakota. See General Findings 2 and 3, *supra*. Nor is the exception of § 78.9(b)(3)(iv) available to respondent. Although ownership was retained by Patrick Grady, the cattle were not moved to another premises owned by him.

Therefore, it must be found that Patrick Grady moved, or caused to be moved interstate, 34 postparturient cows from Dunlap, Iowa, to St. Charles, South Dakota, in violation of § 78.9(b)(3)(ii) of Title 9, Code of Federal Regulations, because the cows were not accompanied by a certificate, as required.

V

Clifton J. ("Tip") Snyder, O'Neill, Nebraska, is the son of Dan Snyder, Sr., identified in Finding IV, and is a driver for Snyder Trucking. On June 8, 1983, in response to a call from his father, he picked up 45 cow/calf pairs and 2 bulls from the Grady farm, Dunlap, Iowa, for delivery to Vance M. Feyereisen, Iona, South Dakota. His "Permit for Live Stock Transportation," No. 1711, dated June 8, 1983, showed the name of John Kryeakakis, Dunlap, Iowa, as the owner. Jim Grady signed as the authorized agent for the owner. He listed only the total number of cow/calf pairs and the two bulls on this Permit. As a transporter of cattle, he is required to fill out this Permit by the State of Nebraska for every load of cattle he hauls. He was given the name of the owner and the fact that he was from Florida by Mr. Feyereisen. He only received a sealed envelope from Jim Grady to accompany the cattle and turned it over to the consignee upon delivery of the cattle. Mr. Snyder did not know what was in this envelope (CX-49, 11; Tr. 71-75).

Mr. Vance M. Feyereisen, Gregory, South Dakota, provided an affidavit stating that in June and July, 1983, Pat and Rose Mary Grady boarded cattle in his pastures. He was present each time when the cattle were unloaded, but the truck driver did not provide him with any official health papers on either load when the cattle were delivered, nor did he have any record of eartags being on the cattle. By a written agreement, dated June 8, 1983, between "John Grady," cattle owner, and Mr. Feyereisen, the latter agreed to provide grazing in Lyman County, South Dakota, and other services for 45 cow/calf pairs and two bulls for the 1983 season of no less than five (5) months, at the rate of \$14.00 per month per cow/calf pair, and \$14.00 per month for each bull. Mr. Feyereisen signed the agreement before a notary public on June 8, 1983. Although the name "John Grady" is the name listed in the body of the agreement, it was deleted as the owner on the signatory line

and the name Rose Mary Grady was inserted as cattle owner. Mary Grady signed the agreement before a notary public Broward County, Florida, on June 21, 1983. John Grady was inserted in this agreement because Mr. Feyereisen assumed the "John" who was at his ranch was John Grady. However, he was in error and this was the reason for the signature change in the agreement. The "John" was believed to be John Kryeakakis (CX-65, 66).

The evidence of record shows that Rose Mary Grady was the owner of the 45 cow/calf pairs and two bulls involved here, that James Grady was her authorized agent, and that the cattle were moved interstate for her benefit and at her behest from Dunlap, Iowa to grazing land owned by Mr. Feyereisen in Lyman County, South Dakota. These facts are not rebutted in this record. See also General Findings 2 and 3.

As with Finding IV, the signed agreement shows that the one charged Rose Mary Grady was for grazing and other services to be provided and not for lease of grazing land. Further, since James Grady was designated as her duly authorized agent who, as principal and owner of the cattle, is responsible for his action in moving the cattle interstate without a certificate as required. Further, the action of James Grady was acknowledged and approved by Rose Mary Grady in signing the grazing agreement approximately two weeks after the interstate movement of the cattle. Again, as with Finding IV, the exemption of Section 78.9(b)(3)(iv) is not available since the cattle were moved to a premise not owned by Rose Mary Grady.

Therefore, it is found that Rose Mary Grady moved, or caused to be moved, 45 postparturient cows interstate in violation of Section 78.9(b)(3)(ii) of Title 9, Code of Federal Regulations, as they were not accompanied by a certificate, as required.

VI

Mr. Clifton J. ("Tip") Snyder is the same person identified in Finding V, *supra*. In response to a call from his father on June 21, 1983, he transported a load of cow/calf pairs, some loaded at the Grady farm, Dunlap, Iowa, and some loaded at the Moorehead Livestock Market, Moorehead, Iowa. He delivered some of these cattle to a farm near Merville, Iowa, and the remainder to a sale barn in Huron, South Dakota. As with the previous load in June, 1983, he received a sealed envelope from one of the Gradys and was told it contained the health papers covering the cattle. Upon arrival at this destination, this sealed envelope was delivered to the consignee. Jim Grady paid for the transportation of these cattle. The Nebraska "Permit for Live Stock Transportation," No. 1714, dated

June 21, 1983, which Mr. Snyder filled out, shows Jerry Bales, Huron, South Dakota, as owner, and that 23 cow/calf pairs were transported from Dunlap, Iowa, to Huron, South Dakota on that date. Total transportation charges were \$393.90 toward which Jim Grady paid \$100. The authorized owner's agent was shown as (sic) Alan Bales (CX-4, 11, 70; Tr. 79-80, 84-85).

At a meeting between Mr. George Crowell, Compliance Officer, Animal and Plant Health Inspection Service, USDA, Jerry, Kent and Allen Bales, records of the Bales Continental Commission Company (BCCC), Huron, South Dakota, were provided which showed that this company purchased 23 mixed cow/calf pairs at \$525.00 per pair, a total of \$12,075.00, from Jim Grady, Route 2, Dunlap, Iowa, and that \$150.00 was added for charges by Snyder Trucking. The company records also showed that it issued a check to Jim Grady, dated August 22, 1983, in the amount of \$12,075.00.

It was explained by Jerry Bales in an interview with Mr. Crowell that Jim Grady had contacted that company to have them sell some of his cattle at their auction barn. When the cattle first arrived, Jim Grady was advised they were too thin and would not sell for the price Jim Grady desired. It was recommended before any sale that they be placed in pasture, and they were. A month or two later, Jim Grady called Jerry Bales advising him of his need for money. At that time, the above check was issued to Jim Grady (CX-68-69; Tr. 341-347).

Documents and testimony of record show that 23 cow/calf pairs were transported from the Grady farm, Dunlap, Iowa, to the BCCC, Huron, South Dakota, an interstate movement requiring the necessary certificate. Although Mr. Snyder, the truck driver for this movement, listed Mr. Jerry Bales as the owner of these cattle on his permit, it is clear from other testimony and documents of record relating to the transaction that James Grady was the owner of the 23 cow/calf pairs and shipped them to BCCC for sale at auction.

The above evidence is not rebutted in this record. See General Findings 2 and 3, *supra*. As stated in Findings II-III, the exceptions set forth in § 78.9(b)(3)(iii) and § 78.9(b)(3)(iv) are not available here for the reasons stated in that Finding. It must therefore be found that James Grady moved, or caused to be moved interstate the postparturient cattle involved here in violation of Section 78.9(b)(3)(ii) of Title 9, Code of Federal Regulations, as they were not accompanied by a certificate, as required.

VII

Mr. Leslie Dean Brown, Denison, Iowa, has been transporting livestock approximately six years under the name Les Brown Trucking Company. He stated in his affidavit that during the period July to October, 1983, nine loads of cattle were moved by his trucking company from the Grady farm at Dunlap, Iowa, to various locations in South Dakota. His company records show that on July 12, 1983, he transported 96 cattle from the Grady farm at Dunlap, Iowa, and delivered them to "Armstrong, Flandreau, South Dakota." These cattle were mostly cow/calf pairs. The movement of these cattle was ordered by Jim Grady. However, the only papers provided to accompany the cattle was a sealed envelope which was turned over to the consignee upon delivery (CX-22; Tr. 264-266).

Mr. Douglas A. Armstrong, Flandreau, South Dakota, has been a farmer for eight years. In his affidavit, he stated that in the summer of 1983, he saw an ad in the Sioux Falls Argus Leader advertising cows for sale in Iowa. Initially, Mr. Douglas asked his brother-in-law, Sam Flinders, Sutherland, Iowa, to examine some of the cow/calf pairs advertised. Later, Mr. Douglas went to Dunlap, Iowa, where he contracted with Jim Grady to purchase 48 cow/calf pairs. Mr. Flinders was not with him at the time of the purchase, nor did he have any financial interest in the transaction. Mr. Armstrong paid Jim Grady \$1,000.00 as a down payment on the purchase price of the cattle. It was understood that Jim Grady was to deliver these cattle to him at Flandreau, South Dakota, and that Jim Grady was to take care of the necessary papers and health certificate.

Upon delivery at his farm, the only papers provided Mr. Armstrong by the truck driver was an intrastate health certificate. This was made out to Sam Flinders, his brother-in-law, who had no interest in the cattle, and was made out for intrastate shipment to Sutherland, Iowa. The "Intrastate Health Certificate" was issued on July 11, 1983, by the Iowa Department of Agriculture, Division of Animal Industry, and contained the caution "Not Valid for Interstate Shipment." It showed that on the date issued, the seller, James Grady, had 48 cattle tested (No. 42CND2101 through No. 42CND2148) for brucellosis. Their backtags were listed as Nos. 3550-3598, with No. 3567 being voided. The purchaser was listed as Sam Flinders, Sutherland, Iowa. Mr. Armstrong gave the truck driver a certified check, made out to Jim Grady, for the balance due on the purchase price of the cattle, and also gave the truck driver a personal check for the transportation charges due.

Mr. Armstrong provided a copy of a certified cashier's check, No. 46504, dated July 11, 1983, "Payable to James Grady for deposit only at the Dunlap Savings Bank." The check was issued in the amount of \$26,120.00 which reflected the purchase price agreed upon, \$27,120.00, less the \$1,000.00 Mr. Armstrong had previously given James Grady as a down payment on the cattle. This check was given to the truck driver to be delivered to James Grady (CX-71, 72, 73; Tr. 348-350, 388-389).

Affidavits on record reflect that 48 cow/calf pairs were transported from the Grady farm, Dunlap, Iowa, to the farm of Mr. Armstrong at Flandreau, South Dakota, an interstate movement. The record also reflects that negotiations for the purchase of the 48 cow/calf pairs were carried out between James Grady as owner and Mr. Armstrong as purchaser. That the latter was the true purchaser is evidenced by the fact that he paid \$1,000.00 down as part of the purchase price and the remainder of the purchase price by a certified check obtained by Mr. Armstrong the day prior to delivery of the cattle. There is no indication in the record to show that Mr. Les Brown, the truck driver, ever stopped in Sutherland, Iowa. Rather, the record shows that it was a straight haul to Flandreau, South Dakota.

Additionally, the health certificate issued by the Iowa Department of Agriculture, Division of Animal Industry, clearly carried the caution that the certificate was not valid for interstate shipment. As has been noted in the record, the information required by an interstate certificate is more detailed than that required on the Iowa Intrastate Health Certificate (Tr. 13). These facts are not rebutted in this record. See General Findings 2 and 3, *supra*.

Although the documents and testimony pertaining to this count, as also in other counts, were objected to on the basis of hearsay, the Rules of Practice applicable to this proceeding permit reception into the record of relevant and material evidence, § 1.141(g)(iv). Further, responsible and probative hearsay evidence is admissible in administrative proceedings. Such proceedings are not bound by the procedural and evidentiary rules in effect in court proceedings. See 1 Davidson, *Agricultural Law*, § 3.22 and cases cited therein at fn. 113.

Therefore, it must be found that James Grady moved, or caused to be moved, 48 postparturient cows from Dunlap, Iowa, to Flandreau, South Dakota, in violation of Section 78.9(b)(3)(ii) of Title 9, Code of Federal Regulations, as the cows were not accompanied by an interstate health certificate, as required.

VIII

Mr. Clifton J. ("Tip") Snyder is the same person identified in Finding V, *supra*. In response to a call from his father, Du Snyder, Sr., on July 19, 1983, he picked up 45 cow/calf pairs at the Grady's farm, Dunlap, Iowa, and delivered them to Mr. Vance Feyereisen, Iona, South Dakota. The name he placed on his Nebraska "Permit for Live Stock Transportation," No. 1718, dated July 19, 1983, as owner was "Sam B. in care of Pat Grady." Mr. Snyder believed that Pat Grady may have been acting for someone else. As with the previous loads of cattle in June, 1983, Mr. Snyder was only given a sealed envelope to accompany the cattle and told that the envelope contained the necessary health papers for the cattle. On each trip he delivered the sealed envelope to the consignee. Pat Grady paid for the transportation of these cattle (CX-4, 10 11; Tr. 75-79, 82-84).

Mr. Vance M. Feyereisen, Gregory, South Dakota, is the same person identified in Finding V, *supra*. As with the delivery in June the truck driver that delivered the July load of cattle did not leave any official health certificate, nor does Mr. Feyereisen have records which show the cattle had ear tags. Mr. Feyereisen was present when these cattle were unloaded. An agreement, dated July 19, 1983, between Mr. Feyereisen and Rose Mary Grady, cattle owner, provided that the former would provide grazing land in Lyman County, South Dakota for 45 cow/calf pairs and 2 bulls for approximately 4 months at a price of \$14.00 per month, per cow/calf pair, and \$14.00 per month per bull. It also included other services to be provided by Mr. Feyereisen, and obligated Rose Mary Grady to pay the sum of \$1,316.00, for grazing and services. The agreement was signed by Mr. Feyereisen on July 26, 1983, and by Rose Mary Grady as cattle owner on August 4, 1983, before a notary public in Broward County, Florida (CX-65, 67; Tr. 340-341).

The record is clear that 45 cow/calf pairs and two bulls were owned by Rose Mary Grady and were moved for her benefit and at her behest from the Grady farm, Dunlap, Iowa to grazing land owned by Mr. Feyereisen in Lyman County, South Dakota, an interstate movement. As with the previous shipment of cattle in June 1983, Rose Mary Grady acknowledged and approved this movement by signing the grazing agreement approximately one week following their delivery to South Dakota. This agreement was for use of grazing land and other services and was not a lease for the land. As found in Findings IV and V, the exemption found in § 78.9(b)(3)(iv) is not available to Respondent since the premises were not owned by Rose Mary Grady. See General Findings 2 and 3, *supra*.

Therefore, it is found that Rose Mary Grady moved, or caused to be moved, 45 postparturient cows interstate in violation of § 78.9(b)(3)(ii) of Title 9, Code of Federal Regulations, as the cows were not accompanied by a certificate, as required.

IX

The records of Mr. Leslie Dean Brown, who is identified in Finding VII, show that 90 head of cattle were transported on July 31, 1983, from the Grady farm at Dunlap, Iowa, by one of his drivers, Jim Comstock. Jim Grady ordered the movement of these cattle. As with other shipments transported from the Grady farm, the only papers that accompanied the load was a sealed envelope (CX-22, Tr. 265-266).

Mr. Jim Comstock, Denison, Iowa, has on occasion driven a livestock truck for Leslie Brown, *supra*. On or about July 31, 1983, he loaded approximately 90 head of cattle at the Grady farm, Dunlap, Iowa. This load consisted of approximately 45 cows and 45 calves. At the time of loading, one of the Grady brothers, an older man, and Leslie Brown were present. Mr. Comstock delivered these cattle to two different farms, one in Trent, South Dakota, and the other in Dell Rapids, South Dakota. As far as he knew there were no health papers given him to accompany the cattle. However, he was given a sealed envelope to leave with the consignees and health papers may have been in this sealed envelope (CX-51; Tr. 269-270).

Mr. Gary Williams farms and raises cattle at Trent, South Dakota. He purchased 30 cow/calf pairs and 1 Limousin yearling bull from Jim Grady which were delivered to his farm at Trent, South Dakota on July 31, 1983. When Mr. Williams and Jim Grady arrived at an agreement on the purchase of these cattle, Mr. Williams understood that the necessary health papers would accompany the shipment of cattle. Jim Grady arranged for the transportation of the cattle. The only paper presented to him by the trucker upon delivery of the cattle was a handwritten invoice addressed to him showing the price per cow/calf pair (\$537.50), the total price for the 30 cow/calf pairs (\$16,125), the price for the Limousin bull (\$300), and the total price for the shipment (\$16,725). A notation on the invoice stated "make check to Jim Grady." Mr. Williams indicated on this invoice that check no. 1062, dated July 31, 1983, was issued at 10:00 p.m. that evening. A copy of the check indicates that it was issued to Jim Grady on July 31, 1983, in the amount of \$16,725, and that it was endorsed by Jim Grady.

Mr. Williams did not check the cattle for identification at the time of delivery because of the darkness. However, a few days

later, he brought the cattle out of pasture and ran them through a restraining chute to put his own eartags and pasture identification numbers on them. Upon examination, none of the cattle had metal eartags or other identification. He did not check for ear tattoos (CX-18, 19, 20; Tr. 122-130).

Affidavits of record show that 45 cow/calf pairs and one bull were transported from the Grady farm, Dunlap, Iowa, to two separate locations in South Dakota, an interstate movement. As pertinent to this finding, 30 cow/calf pairs and 1 bull were delivered to Mr. Williams' farm at Trent, South Dakota. As will be shown in Findings X-XI, *infra*, the remaining 15 cow/calf pairs were delivered to Mr. Mark Crisp, Dell Rapids, South Dakota.

The transaction here involved Jim Grady as the seller and Mr. Williams as the purchaser. Transportation was arranged by Jim Grady and a check was issued to him by Mr. Williams in payment of the purchase of 30 cow/calf pairs. Additionally, it is apparent that the only document accompanying the shipment was an invoice for the price of the cattle. A health certificate, as described in § 78.1(n) was not provided Mr. Williams by Jim Grady. See General Findings 2 and 3, *supra*. The affidavits here provide substantial evidence to prove the violation alleged and, although they may be considered hearsay evidence, they are admissible in an administrative hearing, as noted in Finding VII.

Therefore, it must be found that James Grady moved, or caused to be moved, 30 postparturient cows from Dunlap, Iowa to Trent, South Dakota in violation of § 78.9(b)(3)(ii) of Title 9, Code of Federal Regulations, as the cows were not accompanied by a certificate, as required.

X-XI

The records of Mr. Leslie Dean Brown, identified in Finding IX, show that on July 31, 1983, one of his drivers, Jim Comstock, transported 90 head of cattle from the Grady farm, Dunlap, Iowa, to Trent, South Dakota.

Mr. Jim Comstock, also identified in Finding IX, on or about July 31, 1983, loaded 90 head of cattle at the Grady farm, Dunlap, Iowa, under the same set of circumstances as set forth in Finding IX. He delivered these cattle to two different farms in South Dakota. As pertinent to this Finding, these cattle were delivered to a farm approximately 1 mile southeast of Dell Rapids, South Dakota. As far as Mr. Comstock knew, there were no health papers given him to accompany the cattle. However, he was given a sealed envelope to leave with the consignee and health papers may have been contained in this sealed envelope (CX-51; Tr. 269-270).

Mr. Mark Crisp is a farmer who resides in Dell Rapids, South Dakota. In two affidavits he stated that in response to an ad he had seen in the Sioux Falls Argus Leader, he called Mr. Grady and told him that he was interested in crossbred cows. Several weeks later, Pat Grady called Mr. Crisp and told him that such cows were available and that they were vaccinated and tested. Mr. Crisp bought 15 cow/calf pairs which were delivered to him on the night of July 31, 1983. However, the trucker did not deliver any health certificates for the cattle to him. The cows delivered to him did not have any metal ear tags, plastic tags or paper back tags, nor did Mr. Crisp receive a brand certificate, or breed association certificate for any of the cattle.

Mr. Crisp contacted Pat Grady who told Mr. Crisp that he could not provide a health certificate for the cattle he had purchased. When asked about ear tags, Pat Grady told him that any ear tags the cows may have had were removed because he did not sell cattle with ear tags. Check No. 2462, dated July 31, 1983, in the amount of \$8,250.00 was issued by Mr. Crisp to Pat Grady in payment for the 15 cow/calf pairs delivered to him. The check shows that it was endorsed by Pat Grady (CX-74, 75, 76; Tr. 251-254).

The affidavits of record clearly show the transportation of 15 cow/calf pairs from the Grady farm, Dunlap, Iowa, to the farm of Mr. Crisp at Dell Rapids, South Dakota, an interstate movement. That these 15 cow/calf pairs were owned by Pat Grady, as distinguished from those delivered to Mr. Williams, Trent, South Dakota, which were owned by Jim Grady (Finding IX), is shown by the fact that Mr. Crisp conducted this purchase with Pat Grady and held him responsible not only for the necessary health certificate and identification papers, but also issued the check in payment for the 15 cow/calf pairs to Pat Grady. In negotiations, Mr. Crisp requested crossbred cows. Pat Grady represented and sold these cows to Mr. Crisp as crossbred cows. Thus, although Jim Grady arranged for the transportation of these cattle, as well as those in Finding IX, it is readily apparent that the 15 cow/calf pairs involved here were owned by Pat Grady. See General Findings 2 and 3, *supra*.

Again, as with findings VII and IX, the affidavits here are substantial evidence upon which to find the violations as alleged. Although they may be considered hearsay evidence, they are admissible as relevant and material in an administrative proceeding, as noted in Finding VII.

Therefore, it must be found that Patrick Grady moved, or caused to be moved, 15 postparturient cows from Dunlap, Iowa to Dell Rapids, South Dakota, in violation of §§ 71.18 and 78.9(b)(3)(ii) of Title 9, Code of Federal Regulations, in that the cows were not

identified with U.S. Department of Agriculture backtags or other approved identification, and were not accompanied by a certificate, as required.

XII-XIII

The records of Mr. Leslie Dean Brown, identified in Finding VII, show that on August 2, 1983, his driver, Harold Wulf, transported 65 head of cattle from the Grady farm, Dunlap, Iowa, to Egan, South Dakota and that on August 16, 1983, he himself transported a load of 63 head of cattle from the same origin to the same destination. These loads were mostly cow/calf pairs, and the movements were ordered by Jim Grady. The only documents accompanying these loads were invoices for the cost of the cattle. No health certificates or other documents were provided to accompany these shipments of cattle. Mr. Brown had never been told to pick up any health certificate or any other document at any point in the movement of cattle for Jim Grady to places in South Dakota or Minnesota (CX-22, 57; Tr. 265-266).

Mr. Harold Wulf, Denison, Iowa, is a truck driver and has on occasion driven a livestock truck for Mr. Leslie Brown, *supra*. On or about August 2, 1983, Jim and Pat Grady helped him load 65 head of cattle at the Grady farm, Dunlap, Iowa. Mr. Leslie Brown was also present at the time of loading. Mr. Wulf delivered some calves and yearlings to the Sheldon Sale Co., Sheldon, Iowa, and the remainder, 23 cow/calf pairs, to a farm approximately 8 miles north of Egan, South Dakota. The consignee was Mr. Hugh Hagel, Flandreau, South Dakota. Mr. Wulf testified that he was only given a sealed envelope to accompany the cattle which he gave to Mr. Hugh Hagel. Mr. Wulf was present when Mr. Hagel opened the envelope. The only document in the envelope was a note listing the price of the cattle and a request to make out the check for the cattle to Jim Grady. No health papers or other identifying papers for the cattle were included. Mr. Wulf recalled that the cattle were cow/calf pairs and it was his opinion that they were not purebred cows. He knew they were cow/calf pairs because the calves paired up with the respective mother cows when unloaded. He obtained two checks from Mr. Hagel, one made out to Les Brown in the amount of \$150.00 for the trucking charges, and one made out to Jim Grady for something over \$11,900.00 for the cattle. He brought back both checks and gave them to Leslie Brown (CX-37, 38; Tr. 217-225).

Mr. Hugh R. Hagel, Flandreau, South Dakota, advised in his affidavits that in August 1983 he purchased a total of 48 cow/calf pairs from Jim Grady, Dunlap, Iowa. When those cattle were deliv-

ered to his farm, the cows did not have any ear tags, back tags or any other means of identification. Likewise, they were not accompanied by an official certificate, brand release, or breed association certificate (CX-77, 78).

Mr. George Crowell, Compliance Officer, Animal and Plant Health Inspection Service, USDA, obtained copies of four checks from Mr. Hugh Hagel. The first, check no. 9554, dated August 2, 1983, was issued to Jim Grady in the amount of \$11,937.00. Mr. Hagel had noted on the copy of the check that it was for 23 pairs at \$515.00 per pair plus a charge of \$4.00 for worming each pair. The second, check no. 9555, dated August 2, 1983, was issued to Les Brown in the amount of \$150.00 in payment of trucking charges for the transportation of these cattle. The third, check no. 9604, dated August 16, 1983, was issued by Jane E. Hagel, Mr. Hagel's wife, to Jim Grady in the amount of \$12,850.00. Mr. Hagel's notation on the copy of the check shows that this amount was for 25 cow/calf pairs at \$514.00 per pair. The amount of the check also included a \$4.00 worming charge per pair. The fourth, check no. 9605, dated August 16, 1983 in the amount of \$150.00 was issued to Les Brown in payment of trucking charges for the transportation of these cattle (CX-89; Tr. 356-358).

Testimony and affidavits of record show that on two separate dates, August 2, 1983, and August 16, 1983, a total of 48 cow/calf pairs were transported from the Grady farm, Dunlap, Iowa to the farm of Mr. Hagel, Egan, South Dakota, an interstate movement. On the first date, Mr. Hagel received 23 cow/calf pairs and on the second date he received 25 cow/calf pairs. All 48 cow/calf pairs were purchased from Jim Grady, who was also responsible for their movement on both dates. The only document accompanying each load was an invoice for the cost of these cattle. Testimony of Mr. Wulf, who was present upon the opening of his sealed envelope, and by Mr. Hagel whose affidavit shows that no health papers or other documents listing or identifying the cows were found in the sealed envelopes presented to him by the drivers. The envelopes only contained invoices showing the price of the cattle delivered to him. On each occasion a check was issued to Jim Grady, the owner of the cattle, in payment for the delivered cattle. See General Findings 2 and 3, *supra*.

The affidavits of Mr. Brown and Mr. Hagel, together with the testimony of Mr. Wulf are substantial evidence upon which to find the violations as alleged. Mr. Hagel's affidavit is further corroborated by the checks issued in payment to Jim Grady for the cattle. As stated in other findings, *supra*, such affidavits are admissible as relevant and material in this administrative proceeding.

Therefore, it must be found that on August 2, 1983, and August 16, 1983, James Grady moved, or caused to be moved, 23 postparturient cows and 25 postparturient cows, respectively, from Dunlap, Iowa to Flandreau, South Dakota in violation of §§ 71.18 and 78.9(b)(3)(ii) of Title 9, Code of Federal Regulations, in that the cows were not individually identified with U.S. Department of Agriculture backtags or other approved identification and were not accompanied by a certificate, as required.

XIV-XV-XVI

In his affidavit, Mr. Jerry Christensen, Secretary/Treasurer and Dispatcher, Speedway Transportation, Inc., Holdrege, Nebraska, stated that his company records show that on August 8, 1983 one of his trucks driven by David Johnson, Holdrege, Nebraska, transported cows and calves from Dunlap, Iowa to St. Paul, Nebraska. His records further show that Jim Grady was the shipper and owner of the cattle and that Mr. Harold Niemoth, Route 2, Grand Island, Nebraska, was the consignee. It is the policy of Mr. Christensen's company to have drivers request health certificates for the cattle they haul. However, he did not know if a health certificate was provided to accompany these cattle (CX-23; Tr. 155-156).

Mr. Daniel L. Johnson, Holdrege, Nebraska, is a truck driver employed by Speedway Transportation, Inc., *supra*. On August 8, 1983, he loaded about 35 cow/calf pairs at a farm southwest of Dunlap, Iowa. He could not recall the names of the men at the farm. He inquired about the necessary health papers to accompany the cattle, but he could not recall what he was told about them. He does know that he was not given any health papers. He could not recall the name of the consignee; however, he did deliver the cattle to the St. Paul Veterinary Clinic at St. Paul, Nebraska on that same date (CX-1; Tr. 31-33).

Dr. Lyle Rasmussen practices veterinary medicine at the St. Paul Veterinary Clinic, St. Paul, Nebraska (Clinic). He testified his records show that on August 8, 1983, he received a shipment of cattle at his Clinic which were owned by Mr. Harold Niemoth, Grand Island, Nebraska. The cattle, which were unloaded from a Speedway truck, consisted of 39 cows with calves, and were of various mixed breeds. Since he was aware that they had been shipped from another state, he asked the Speedway driver for the health certificate which should accompany such a shipment. He was advised by the driver that he did not have one. Dr. Rasmussen testified that the purpose of the stop-off was to brand, worm, dip and give shots to the cattle. This service was done at the request and expense of Mr. Niemoth. After the process was completed the

cattle were shipped to Mr. Niemoth at Grand Island, Nebraska. Dr. Rasmussen's records also show that at a later date, January 24, 1984, he went to the Niemoth farm where he bled and tested these cattle for brucellosis. It was his opinion that these were the same cow/calves he had examined on August 8, 1983, because they were the same breed mixture and of the same age range as those he had previously tested. His records also show that they were beef cattle imported into the State of Nebraska and that they ranged in age from three to twelve years. Metal ear tags were also inserted because the cows were not carrying ear tags when bled (CX-2, 3; Tr. 35-44).

Mr. Harold Niemoth owns a farm near Grand Island, Nebraska. In his affidavit he stated he purchased 39 cow/calf pairs, all over two years of age, from Jim Grady, Dunlap, Iowa. When they were delivered on August 8, 1983, they were not accompanied by a health certificate, brand certificate or any other document showing individual identification. Further, they had no metal ear tags, or USDA backtags. A check obtained from Mr. Niemoth, No. 5883, dated August 7, 1983, shows that he issued it to Jim Grady in the amount of \$20,475.00 in payment for 39 cow/calf pairs. This check was endorsed by Jim Grady (CX-28, 29; Tr. 165-166).

The discrepancy, if it can be considered one, between the "about 35 cow/calf pairs" recited by Mr. Johnson, *supra*, and the 39 cow/calf pairs actually received by Mr. Niemoth is noted and is not pertinent here since Mr. Niemoth has established that 39 cow/calf pairs were purchased and received by him. Dr. Rasmussen stated that he received at his Clinic 39 cow/calf pairs owned by Mr. Niemoth and which were later shipped to him that same date after processing.

Testimony and documents of record show that Jim Grady sold 39 cow/calf pairs to Mr. Niemoth, Grand Island, Nebraska. They were delivered to the St. Paul Veterinary Clinic, St. Paul, Nebraska for treatment, as described above, at the request of Mr. Niemoth. The records of Speedway Transportation, Inc., verify this movement. However, the record, either through testimony or affidavits, fails to show who transported the cattle from the Clinic to Grand Island, Nebraska, or who was responsible for this movement. It has been shown, however, that the delivery to the Clinic was only a stop-off for processing on the way to the Niemoth farm since the cattle were received there on the same day after the processing.

Although the record does not show that James Grady was responsible for the movement from the Clinic to Grand Island, Nebraska, it has been shown that James Grady was the owner and consignor of the cattle and that he shipped the 39 cow/calf pairs

from the Grady farm, Dunlap, Iowa to the Clinic in St. Paul, Nebraska, an interstate movement. It has also been shown that truck driver received no identification papers or health certificate to accompany the shipment, although the cows were described Mr. Niemoth as being over two years of age, and listed by Dr. Rasmussen as ranging in age from 3 to 12 years, with the major being 4 years of age and older. I find to be very credible the testimony of Dr. Rasmussen that the cows he processed on August 1983, were the same cows he tested for brucellosis at the Niemo farm on January 24, 1984. See General Findings 2 and 3, *supra*.

Thus, whether the cattle were delivered directly to Mr. Niemo at Grand Island, Nebraska, or to the Clinic at St. Paul, Nebraska this was still an interstate movement instituted by James Grady and subject to the regulations. Therefore, it is found that on about August 8, 1983, James Grady moved, or caused to be moved interstate 39 postparturient cows over two years of age from the Grady farm, Dunlap, Iowa to the St. Paul Veterinary Clinic, St. Paul, Nebraska, in violation of §§ 71.18 and 78.9(b)(3)(ii) of Title Code of Federal Regulations, as the cows were not individually identified with U.S. Department of Agriculture backtags or other approved identification; were not accompanied by an owner's statement or other document, as required; and were not accompanied by a certificate, as required.

XVII-XVIII-XIX

The records of Mr. Dan Snyder, Sr., who is identified in Finding IV, show that his company transported 42 cows and 32 calves from the Grady farm, Dunlap, Iowa, to Bill Allemang, Clearwater, Nebraska on August 15, 1983 (CX-4).

Mr. Les Nelson is the son-in-law of Dan Snyder, Sr., *supra*. He stated in his affidavit that on August 15, 1983, Dan Snyder, Sr. sent him to pick up a load of cattle at the Grady farm, Dunlap, Iowa. He loaded 32 cow/calf pairs at the Grady farm and approximately 4 or 5 cows at a sale barn near Moorehead, Iowa. When he asked for health papers to accompany the cattle, he was given a sealed envelope and told everything he needed was in the envelope. He delivered the cows to Bill Allemang's farm near Clearwater, Nebraska and gave Mr. Allemang the sealed envelope. When Mr. Allemang opened the envelope in Mr. Nelson's presence, it only contained an invoice covering the cost of the cattle (CX-24).

Mr. William Allemang, Clearwater, Nebraska, is a farmer/rancher. He stated in his affidavit that on or about August 15, 1983 he bought 32 cow/calf pairs from Jim Grady, Dunlap, Iowa. They were mixed colored cows, some spotted, some black and some brown, and

the cows ranged in age from 2 to 5 years. On the same date, and on the basis that Jim Grady would pay the transportation costs in shipping these cattle, he purchased an additional 10 cows from Jim Grady. These latter were an average of about 4 years old and they gave birth to calves a few days after he received them.

The cattle were delivered to Mr. Allemang's pasture near Clearwater, Nebraska. The truck driver gave him a sealed envelope which accompanied the cattle. However, when he opened it, it only contained a self-addressed envelope to Jim Grady, an invoice addressed to him showing the purchase of "32 mixed pairs" for \$17,600.00, and the purchase of "10 bred cows" for \$4,100.00. A notation on the invoice stated "make check to Jim Grady." Jim Grady's telephone numbers were listed as (712) 648-2187 and (712) 648-6495. (These are the same telephone numbers as are listed in CX-32, the advertisement in the Grand Island (Neb.) Daily Independence at page 34. See Findings XX, XXI and XXII). The truck driver was present when he opened the envelope. These cattle were not accompanied by a health certificate, brand certificate, or any other document showing individual identification of the cattle. Mr. Allemang did not examine the cows for ear tattoos.

Mr. Allemang provided a copy of a sight draft, dated August 15, 1983, made out to Jim Grady in the amount of \$21,700.00 in payment for the 42 cows and 32 calves. The sight draft was given to the truck driver who then forwarded it to Jim Grady. It was later endorsed by Jim Grady and cleared the Dunlap Savings Bank, Dunlap, Iowa, on August 18, 1983.

Mr. Allemang stated that he later had the Grady cattle, as well as four other cows in the same pasture, examined for brucellosis inasmuch as the Grady cattle had come into the state without proper blood testing (CX-13, 14, 15; Tr. 98-106, 119).

It is noted here that the Amended Complaint cites James Grady as having moved approximately 40 cows on this date, whereas Mr. Allemang acknowledges purchasing 42 cows and 32 calves from Jim Grady. The difference is not pertinent here. Mr. Allemang has acknowledged receiving and paying for the 42 cows and 32 calves in the shipment.

In his affidavit Richard N. Bruce, D.V.M., Orchard, Nebraska, stated that on September 28, 1983, he brucellosis tested 46 head of cattle for Mr. William Allemang, Clearwater, Nebraska. He understood that 42 of the cattle were recently purchased by Mr. Allemang and shipped into Nebraska without tests 3 or 4 weeks before, and the other 4 were cows he had running with them in the pasture. He noted that the majority of the cows were 6-10 years old, and that 4 or 5 of them were 3-4 years old. He further noted that

five of the cows had brucellosis vaccination tattoos, that one had Iowa metal eartag, and that another cow had a Nebraska metal eartag. Some of the other cows had holes in their ears, indicating to him that they had previously been eartagged. He applied the eartags to the 44 head which did not have them. Although Bruce did not mouth each cow, he recorded on his test sheet if they were all adult cows (CX-16; Tr. 174).

The documents of record show that 32 cow/calf pairs from the Grady farm, Dunlap, Iowa, and 10 cows from a sale barn at Maquoketa, Iowa, were transported to the farm of Mr. Allemang, Clearwater, Nebraska, an interstate movement. It is clear that Mr. Allemang paid Jim Grady the amount for all of the cattle he received. It is also clear that only a sealed envelope was provided to the truck driver to accompany the shipment and that when this was opened by Mr. Allemang it contained only an invoice listing total number of cattle and the price to be paid for each group. Added to the invoice was the notation to pay the purchase price to Jim Grady in the form of a check. No other identifying documents or health certificate accompanied this shipment. The sight draft for the amount due in payment of the cattle was made out to Jim Grady, forwarded to him by the truck driver, and endorsed by Jim Grady. It has also been shown that these cattle were tested by Dr. Bruce because they came into the State of Nebraska without the proper blood testing. The test chart of Dr. Bruce noted that these were the cows that were delivered to Mr. Allemang approximately 3 to 4 weeks previous, that the majority of the cows were of mixed breed and between 6 and 10 years of age, that one had an Iowa metal eartag while another had a Nebraska metal eartag, and that some had holes in their ears indicating that the eartags had been removed. See General Findings 2 and 3, *supra*. As noted in Finding VII, the affidavits here are relevant and material and are admissible in administrative proceedings.

Therefore, it must be found that James Grady moved, or caused to be moved interstate, forty-two cows either parturient or postparturient and over two years of age, from Dunlap and Maquoketa, Iowa to Clearwater, Nebraska in violation of §§ 71.18 and 78.9(b)(3)(ii), Title 9, Code of Federal Regulations, because the cows were not individually identified with the U.S. Department of Agriculture backtags or other approved identification, as required; were not accompanied by an owner's statement or other document, as required; and were not accompanied by a certificate, as required.

XX-XXI-XXII

Mr. Dan Snyder, Sr., identified in Finding IV, stated that on September 2, 1983, his son, Danny Snyder, transported 31 cows from the Grady farm, Dunlap, Iowa, to the farm of Bob Ondracek, Greeley, Nebraska. On this trip Danny Snyder was checked for a health certificate at the state scales near Freemont, Nebraska. However, the sealed envelope given to his son at the Grady farm only contained a sales invoice and no health certificate. When he discussed this with his other drivers, Mr. Dan Snyder, Sr., was told that they also only received sealed envelopes to accompany any shipment of cattle from the Grady farm, Dunlap, Iowa (CX-4).

Mr. Danny Snyder, Jr., identified in Finding IV, on or about September 2, 1983, transported a load of cows for Pat and Jim Grady, Dunlap, Iowa, to Greeley, Nebraska. In filling out his Nebraska "Permit for Live Stock Transportation," No. 20727C, dated September 2, 1983, he recorded Pat and Jim Grady as the owners and Mr. Bob Ondracek, Greeley, Nebraska, as the consignee. Mr. Snyder listed the load as "31 heifers" because that is what he was told the load contained. However, in his opinion, they were full grown cows. As with other loads from the Grady farm, he received a sealed envelope, which he presumed contained the necessary health papers, to accompany the cattle. While enroute to Greeley, Nebraska, he stopped at the state scales at Freemont, Nebraska, where he was asked for the health papers. When he looked in the envelope, the only document it contained was a sales invoice covering the price of the cows on his truck (CX-6, 7; Tr. 60-68).

Mr. Bob Ondracek is a farmer residing near Greeley, Nebraska. In his affidavit he stated he purchased 31 bred cows from Jim Grady, Dunlap, Nebraska, which were delivered to him on September 2, 1983. These cows were not accompanied by a health certificate, brand certificate, or any other document showing individual cow identification. Nor did any of the cows carry metal ear tags or USDA approved back tags. Mr. Ondracek had hangle tags placed on these cows for his own identification purposes. He purchased these cows through an advertisement he had seen in the Grand Island (Neb.) Daily Independent in late August or early September, 1983. He responded to the telephone numbers in the advertisement, (712) 643-2187 and (712) 643-5496, which resulted in his purchase of the 31 cows from Jim Grady. The telephone numbers listed in this newspaper advertisement are the same telephone numbers as are listed for Jim Grady on CX-13, and were later confirmed through the telephone company as being listed for Jim Grady and Pat Grady (See also Findings XVII-XVIII-XIX) (CX-32; Tr. 375).

Mr. Ondracek provided a copy of the invoice which was the only document he received from the truck driver upon delivery of these 31 cows. The invoice was addressed to him and listed the purchase price of "31 mixed bred cows", at \$350.00 each for a total cost of \$10,850.00. Mr. Ondracek made a notation on the invoice that he had issued check no. 2424 on September 2, 1983, in the amount of \$10,850.00. Mr. Ondracek also provided a copy of check no. 2424 dated September 2, 1983, which showed that it was issued to Jim Grady in the amount of \$10,850.00 for "31 cows." The check was endorsed by Jim Grady and was cleared through the Dunlap Savings Bank, Dunlap, Iowa (CX-30, 31, 32, 33; Tr. 166-173).

Mr. Maurice Partridge, identified in Findings II-III, was working at the state scales, Fremont, Nebraska, when Mr. Danny Snyder stopped there with the load of 31 cows on September 2, 1983. When Mr. Snyder was called in by the state scale operator all he had was a sealed envelope. When he opened the envelope it only contained an invoice. No health papers or other identifying documents were found in the envelope. Mr. Partridge looked at about two-thirds of the cattle through the slats in the trailer and in his opinion the load consisted of cows at least two years of age, and all of them appeared to have had at least one or more calves. He could not see any metal ear tags on the cows. The only identification he could see on the cows were yellow bangle tags with numbers on them (Tr. 174-178).

An affidavit, dated March 6, 1985, provided by Doug Wurster D.V.M., a partner for the past five years in the Twin Valley Veterinary Clinic, Dunlap, Iowa, stated that the records of the Clinic show no interstate health certificates for movement of cows were issued to Jim, Pat, or Wendell Grady in the 10 months prior to November 17, 1983. However, the Clinic records did show that six intrastate health certificates were issued to the Gradys during this time period. Of the cattle he has tested for the Gradys, none have had any identification and the ear tags had obviously been removed from some cows (CX-52; Tr. 270-271).

Dr. Dan Nielsen, practices veterinary medicine at the St. Paul Veterinary Clinic, St. Paul, Nebraska. On September 7, 1983, he blood tested 31 cows recently purchased by Mr. Bob Ondracek. It was his understanding that Mr. Ondracek had purchased the cows in Iowa. When tested, a few of the first cows were mouthed and were found to be anywhere from four to six years of age. All 31 cows seemed to be a fairly uniform age group and he presumed that the ones not mouthed were also four to six years of age. For this reason, he classified all of the 31 cows on his test sheet as adult cows. All of the cows had yellow plastic ear tags which had

been previously placed on them by Mr. Ondracek. None had any official metal ear tags. However, each of the cows had holes in their ears which were surrounded by scales. This indicated to him that they had had ear tags but that they had been removed, possibly within the previous 2 or 3 weeks prior to the testing. It was his opinion that they were not removed by Mr. Ondracek since he did not have a restraining chute to hold a cow steady to remove such tags. Dr. Nielsen did not examine these cows for ear tattoos, nor was he acquainted with registration requirements for any purebred breed associations.

When these 31 cows were blood tested for brucellosis, each was identified by attachment of the approved metal ear tag. Dr. Nielsen's records show that these cows were identified with metal ear tags, numbers 47AVJ 4748 through 47AJV 4778, that he considered all of them to be adult cows, i.e. all over 2 years of age, and cross-bred. All tested negative for brucellosis. Dr. Nielsen's records also show that Jim Grady, Dunlap, Iowa, paid for the 31 cows tested on September 7, 1983, and that he billed Jim Grady because Mr. Ondracek advised him that the owner of the cattle had agreed to pay for the testing. A receipt, no. 36025, acknowledging payment of \$77.00, was issued by the Clinic to Jim Grady, owner, Dunlap, Iowa, for the testing of 31 cows for "blood test on Bob Ondracek cows."

Dr. Nielsen acknowledged that it was possible for a female cow to give birth at 16 months of age. However, it was his experience that owners of purebred cows would let them mature to 2 or 3 years before they would breed them. He would consider the general norm to be that a cow would birth a calf at two years of age (CX-62, 63, 64; Tr. 315-334).

The record, through testimony and documents, shows that 31 cows were transported from the Grady farm, Dunlap, Iowa to the farm of Mr. Bob Ondracek near Greeley, Nebraska, an interstate movement. Although the truck driver, Danny Snyder, was told by the Gradys that these cows were "heifers", and listed them as such on his Permit, it was his opinion that they were adult cows. Mr. Maurice Partridge, Compliance Officer, U.S. Department of Agriculture, viewed about two-thirds of these cows at the Freemont, Nebraska State scales and believed them to be at least two years of age.

Dr. Nielsen blood tested the 31 cows and mouth examined the first few which he found to be 4 to 6 years of age. It was his opinion the others were of the same age group. He also noted that all of the cows had holes in their ears which were scaled, indicating to him that ear tags had been removed 2 to 3 weeks before the testing

date. His bill for the testing was issued to, and paid by, Jim Grady, who was listed as the owner of the cattle and responsible for testing.

It is also apparent from the record that the only document provided the driver to accompany these cattle was an invoice listing the total number of cattle and the price. No identification papers or health certificate was provided him, nor were they provided to Ondracek. See General Findings 2 and 3, *supra*. The bangles placed on these cows by Mr. Ondracek do not meet the identification requirements of the regulations. Additionally, the amount due the cattle was paid to Jim Grady, who acknowledged this payment by endorsement of the check. These facts are not rebutted in the record.

It is noted here, however, that both Patrick and James Grady are cited as dual violators under these counts. The only evidence in the record to show that Patrick Grady was involved in this movement is the affidavit and testimony of Danny Snyder, the truck driver who listed them as owners on his Permit. It is evident from the record that on several occasions both Patrick and James Grady were noted as having aided in loading cattle from the Grady farm. However, here the evidence is clear that James Grady alone negotiated with Mr. Ondracek for the purchase of the cattle, received payment for the cattle involved, and paid for the blood testing of the cattle. Therefore, I find that James Grady alone was responsible for this movement, and dismiss Patrick Grady as a party to these counts.

Therefore, it must be found that James Grady moved or caused to be moved interstate 31 cows, which were over two years of age from Dunlap, Iowa, to Greeley, Nebraska, in violation of §§ 71.2 and 78.9(b)(3)(ii) of Title 9, Code of Federal Regulations, because the cows were not individually identified with the U.S. Department of Agriculture backtags or other approved identification; were not accompanied by an owner's statement or other document listing individual identification; and were not accompanied by a certificate, as required.

XXIII-XXIV

Mr. Leslie Dean Brown, identified in Finding VII, stated in his affidavit that his company records show on September 2, 1983, a load of cattle was picked up by one of his trucks at the Grady farm, Dunlap, Iowa, that 28 head were delivered to Harrisburg, South Dakota and the "rest of load" was delivered to (sic) "Klein, Del Rapids, South Dakota." As with previous loads picked up at the Grady farm, Dunlap, Iowa, the cattle were mostly cow/calf pairs.

Jim Grady ordered the movement of this load, and the only papers provided to accompany the cattle were invoices showing the cost of the cattle. No health certificates, or other identifying documents, were provided him or his drivers to accompany the interstate movement of the cattle (CX-22; Tr. 264-266).

In several affidavits provided by William J. Klein, Dell Rapids, South Dakota, he stated that on or about September 2, 1983, Jim Grady had 35 cow/calf pairs transported from Dunlap, Iowa to his farm in Dell Rapids, South Dakota. Mr. Klein noted that when unloaded, one of the cows was not the mother of the calf at her side. These cows were not accompanied by identification tags, backtags, ear tags, breed registration papers, or any official health certificate. Before he had these cows tested, he sold nine of the cows for slaughter. Mr. Klein provided a copy of a check, no. 2830, issued by his wife on September 2, 1983, to Jim Grady in the amount of \$16,625, in payment for the purchase of the 35 cow/calf pairs. This check was endorsed by Jim Grady. Mr. Klein provided a copy of a second check, no. 2831, also issued by his wife on September 2, 1983, to Les Brown in the amount of \$175.00 in payment for trucking charges (CX-79, 80, 81, 82; Tr. 361-363).

Dr. Don M. Oolman, Jasper, Minnesota, a practicing veterinarian for thirty years, stated in his affidavit that on October 28, 1983, he tested 26 cows for William Klein, Dell Rapids, South Dakota. It was his professional opinion that all of the cows were over two years old. He further noted that he inserted ear tags in each of the cows because they did not have official ear tags. He listed all 26 as adult beef cows on his brucellosis test record, a copy of which was subsequently obtained from the South Dakota Livestock Sanitary Board (CX-83, 84; Tr. 361-363).

The documents of record show that 35 cow/calf pairs were transported from the Grady farm, Dunlap, Iowa, to the farm of Mr. William Klein, Dell Rapids, South Dakota, an interstate movement. Further, that these cattle were not accompanied by any identifying documents or health certificate. Dr. Oolman noted, after testing the remaining 26 cows and based upon his years of experience in treating and testing cattle, that all of the cows were adult cows over two years of age. See General Findings 2 and 3, *supra*. Negotiations for the purchase of the cattle were conducted with Jim Grady, and the check for payment of the 35 cow/calf pairs was issued to, and endorsed by, Jim Grady. These facts are not rebutted in this record.

As was noted in Finding VII, the affidavits here comprise relevant and material evidence and are admissible in administrative proceedings. They provide substantial evidence to prove the viola-

tions alleged. Therefore, it must be found that James Grady moved or caused to be moved interstate 35 postparturient cows over two years of age from Dunlap, Iowa, to Dell Rapids, South Dakota, in violation of §§ 71.18 and 78.9(b)(3)(II) of Title 9, Code of Federal Regulations, because the cows were not individually identified with U.S. Department of Agriculture backtags or other approved identification; and were not accompanied by a certificate as required.

XXV

Mr. Dick Holmes is a truck driver for Sioux City Motor Express, Inc., Sioux City, Iowa. In his affidavit, he stated that on or about September 3, 1983, he was ordered by his dispatcher to pick up a load of cattle for Jim Grady at the Mid-America Stockyards, Bristow, Oklahoma. When he met Jim Grady at the Mid-America Stockyards, he told Mr. Holmes to proceed to a farm near Afon, Oklahoma, which he believed was the Dick Todd farm, and pick up a load of cattle. He believed it was the Todd brothers who helped him load 40 cows and 40 calves at the farm. He asked for the health papers when the loading was completed and was advised by the Todds that he didn't need any. When Mr. Holmes insisted on them they called Jim Grady at the Mid-America Stockyards, Bristow, Oklahoma. Mr. Holmes talked to Jim Grady of the need for health papers or other documents to accompany the cattle to Iowa. After Mr. Holmes again insisted on documents to accompany the cattle, Jim Grady impolitely ordered Mr. Holmes to get in his truck and go. Mr. Holmes then transported the 40 cows and calves to the Grady farm, Dunlap, Iowa, without any health certificate. Jim Grady's brother helped him unload the cattle (CX-53; Tr. 272-273).

Mr. Richard A. Gunderson, Compliance Officer, USDA, obtained a copy of a Sioux City Motor Express, Inc., bill of lading, no. 11781, dated September 3, 1983, from Mr. Holmes which showed that 40 cows and 40 calves were transported from the farm of Richard Todd, Jr., Vinito, Oklahoma to the consignee, Pat Grady, Dunlap, Iowa. Mr. Pat Grady signed the invoice when they were delivered (CX-54; Tr. 274-275).

Ms. Barbara Pearman, Supervisor, Records Section, Oklahoma Department of Agriculture, Oklahoma City, Oklahoma, provided an affidavit in which she stated that a search of the export files of that Department failed to show any documents issued to Jim or James Grady for cattle consigned from Mid-America L/S Auction, Bristow, Oklahoma, to Dunlap, Iowa (CX-1) nor was a destination copy of any export certificate received by the Iowa Department of Agriculture. See General Finding No. 3.

The affidavits of record show that 40 cows and 40 calves were transported from the Todd Brothers farm at Vinito, Oklahoma to the Grady farm, Dunlap, Iowa, an interstate shipment. It is apparent that although Mr. Todd is listed as the shipper, that the cattle were purchased by Jim Grady, and that he ordered their interstate movement. It is also apparent that "40 cows and 40 calves" were moved in this interstate shipment. However, the only indication that the 40 cows being transported may have been covered by the cited regulations was the request by Mr. Holmes for the health papers. This request alone is not sufficient to sustain the allegations here. Nor, is there any connective evidence to show the age of the cows, or whether they were "cow/calf pairs." The evidence only shows "40 cows and 40 calves" were transported. Since neither is shown, this allegation must be dismissed.

XXVI-XXVII

Mr. Melvin Snyder, Ansley, Nebraska, is the son of Mr. Dan Snyder, Sr., identified in Finding No. IV. Somewhere around the first of September, 1983, he received a call from Pat Grady, who wanted a load of cows transported to Avon, South Dakota. When Mr. Snyder advised Pat Grady that the cows would have to be brucellosis tested and have health papers to accompany them, Pat Grady became abusive and stated that the cows could be tested at destination. Pat Grady also stated that he would pay any fine if Mr. Snyder transported the cows. When Mr. Snyder refused to transport the cows without a health certificate, Pat Grady advised him he would get someone else to transport the cattle (CX-12; Tr. 87-91).

Mr. Bobby Lee Olsen, Avon, South Dakota, provided an affidavit in which he stated that he only transported one load of cattle for the Grady farm, Dunlap, Iowa, and that was to the Adolph Krcil farm near Avon, South Dakota. The load consisted of 29 cow/calf pairs; however, he was not given any health papers or certificates to accompany these cattle (CX-87; Tr. 366-367).

In his affidavit, Mr. Allen Krcil, Crooks, South Dakota, stated that on September 8, 1983, he purchased 29 cow/calf pairs from Jim Grady, Dunlap, Iowa. Jim Grady arranged for the transportation of these cattle which were delivered to Mr. Krcil's father's farm at Avon, South Dakota. The cows were not accompanied by any health certificates, nor did they have metal ear tags or back tags (CX-85; Tr. 364-365). Mr. Krcil provided a copy of his check, no. 1534, dated September 8, 1983. This check was issued by Mr. Krcil to Jim Grady in the amount of \$15,700.00 and was in pay-

ment of 29 cow/calf pairs. The check was endorsed by Jim Grady (CX-85; Tr. 365).

A copy of a Brucellosis Test Record, obtained from the South Dakota State Livestock Sanitary Board, shows that on October 1, 1983, Mr. Allen Krcil had 56 cows, described on the Test Record as adult, tested for brucellosis by Dr. David A. Barz, Parkston, South Dakota. At the time of the testing, a metal ear tag was placed on each cow in numerical order (46JNL2601-46JNL2656). If there had been ear tags on these cows, the record would have listed them in the numerical sequence would have been broken. The state veterinarian called Dr. Barz and was assured the cows did not have any previous metal ear tags. Those designated in the extreme right column on the test record with the letter "H" were cows which Mr. Krcil already had on his farm, while those designated with the letter "P" were those purchased from Jim Grady, Dunlap, Iowa (CX-88; Tr. 367-371, 381).

Documents of record show that 29 cow/calf pairs were transported from the Grady farm, Dunlap, Iowa, to the farm of Mr. Allen Krcil's father near Avon, South Dakota, an interstate movement. The record further shows that the truck driver, Mr. Olsen, was not provided with any health papers to accompany this shipment of cattle, nor was any health certificate ever provided Mr. Krcil. It was noted by Mr. Krcil that the cows did not have any metal ear tags, or backtags, when they were delivered at Avon, South Dakota. Because a health certificate was not provided, Mr. Krcil found it necessary to have these cows, along with others, brucellosis tested at a later date. At the time of the testing, Dr. Barz found it necessary to place ear tags on these cows because none were present when received by Mr. Krcil or when tested by him for brucellosis. There is no question as to ownership of the cow/calf pairs, since Mr. Krcil stated they were purchased from Jim Grady, and a check for the purchase price was issued to Jim Grady and endorsed by him. These facts are not rebutted in this record. See General Findings 2 and 3, *supra*. As noted in Finding VII, the affidavits here are relevant and material and are admissible in this administrative proceeding.

Thus, it must be found that James Grady moved, or caused to be moved interstate, 29 postparturient cows from the Grady farm, Dunlap, Iowa, to Avon, South Dakota, in violation of §§ 71.18 and 78.9(b)(3)(ii) of Title 9, Code of Federal Regulations, because the cows were not individually identified with U.S. Department of Agriculture backtags or other appropriate identification, and were not accompanied by a certificate, as required.

XXVIII

The records of Mr. Leslie Dean Brown, who is identified in Finding No. VII, show that on September 16, 1985, he transported a load of cattle from the Grady farm, Dunlap, Iowa to "Kroupa, Kimball, South Dakota." As with previous loads transported from the Grady farm, the cattle transported were mostly cow/calf pairs, and the movement was ordered by Jim Grady (CX-22).

In an affidavit provided by Mr. Alan Kroupa, Kimball, South Dakota, he stated that in September, 1983, he received a load of cow/calf pairs from Iowa. The load was accompanied with a certificate listing Jim Grady as the seller and the Olsen Cattle Co., Merrill, Iowa, as the purchaser. To the best of his knowledge, all of the cows had silver metal tags (CX-89; Tr. 371-372).

Mr. Kroupa provided an Intrastate Health Certificate issued by the Iowa Department of Agriculture, Division of Animal Industry, on September 15, 1983. The Certificate carried a caution "Not Valid for Interstate shipment." It listed Jim Grady as the seller, and reflected the testing of 40 cows for brucellosis. The test for all was negative. The purchaser was listed as the Olsen Cattle Co., Merrill, Iowa. Mr. Kroupa certified on a copy of this certificate, that it had accompanied the cattle he purchased from Jim Grady. See General Findings, Nos. 2 and 3, *supra*. (CX-90; Tr. 372-373).

Mr. George Crowell, Compliance Officer, USDA, identified in Findings XII-XIII, testified that Mr. Arlo Olsen, Kimball, South Dakota, had been the order buyer or middleman who arranged the sale of these cattle between Mr. Kroupa and Jim Grady. Mr. Kroupa paid Mr. Olsen for these cattle. Mr. Crowell admitted that there was a possibility these cattle were sold to the Olsen Cattle Company, Merrill, Iowa, and that they were later sold and shipped by that company to Mr. Kroupa in Kimball, South Dakota. However, he doubted that this was the case since the records of Mr. Leslie Brown show that the cattle were to be transported from the Grady farm, Dunlap, Iowa to Mr. Kroupa at Kimball, South Dakota (CX-22; Tr. 373-374, 376-378).

From the records and affidavit of Mr. Les Brown, it is clear that the shipment of cattle was cow/calf pairs, and that they were transported from the Grady farm, Dunlap, Iowa, to Mr. Kroupa, Kimball, South Dakota, on September 16, 1983. This was an interstate movement which was ordered by Jim Grady. Mr. Brown's records also negate any inference that there was a stop-off at the Olsen Cattle Co., Merrill, Iowa, or that the cattle were reshipped from that company to Kimball, South Dakota. Mr. Kroupa also attests to the fact that the shipment consisted of cow/calf pairs. Further, that only the Iowa Intrastate Health Certificate, listing the 40

cows, accompanied the shipment and was presented to him when they were delivered in Kimball, South Dakota. The Certificate also shows Jim Grady as the seller of these cattle. These un rebutted facts buttress the testimony of Mr. Crowell who stated that Mr. Arlo Olsen had only been the middleman in the transaction between Jim Grady and Mr. Kroupa, and that the cattle were delivered directly from the Grady farm to Mr. Kroupa at Kimball, South Dakota. See General Findings 2 and 3, *supra*. It is also noted that the Iowa Intrastate Health Certificate contains the caution "Not Valid for Interstate shipment." Additionally, the information required by an interstate certificate, as described in § 78.1(n), is more detailed than that required on the Iowa Intrastate Health Certificate (Tr. 13). Hence, the Iowa Intrastate Certificate does not meet the requirements of the regulations nor achieve their purpose. As noted in Finding VII, the affidavits are relevant and material and such responsible and probative hearsay evidence is admissible in administrative proceedings.

Therefore, it must be found that James Grady moved, or caused to be moved interstate, 40 postparturient cows from the Grady farm, Dunlap, Iowa, to Kimball, South Dakota, in violation of § 78.9(b)(3)(ii) of Title 9, Code of Federal Regulations, because the cows were not accompanied by a certificate, as required.

XXIX

Mr. Leon Krueger, Emerson, Nebraska, is a truck driver for the Sioux City Motor Express, Inc., Sioux City, Iowa. On or about September 17, 1983, his dispatcher requested him to pick up a load of cattle for Jim Grady at the Sale Barn, Bristow, Oklahoma. He arrived at the Sale Barn about 7:00 p.m. on that Saturday night, September 17, 1983, and at about 2:00 a.m. Sunday morning Jim Grady helped him load about 20 cow/calf pairs, several other calves and some yearling steers. A cow/calf pair is a cow with her calf. Jim Grady knew which pens from which to take the cattle. Jim Grady accompanied him on the trip. He had a briefcase which Mr. Krueger assumed contained the health papers; however, Mr. Krueger never saw any health papers. When he asked about the health papers, Jim Grady told him he had all the papers they needed.

They arrived at the Grady farm, Dunlap, Iowa, at about noon on Sunday, at which time Jim Grady's father helped in unloading the cattle. The cow/calf pairs were put in a separate pen while the yearlings were run through a restraining chute where all Sale Barn backtags and ear tags were removed. The yearlings were then loaded back on his truck and he transported them to the Moore-

head Sale Barn, Moorehead, Iowa. The cow/calf pairs remained at the Grady farm. It was his opinion that the cattle were mixed breeds. Mr. Krueger made no effort to determine how old the cattle were.

Mr. Krueger provided a copy of a Sioux City Motor Express, Inc., invoice, no. 11825, dated September 18, 1983, which he filled out and which showed that he transported 70 cattle from the Bristow Sale Barn, Bristow, Oklahoma, to the Grady farm, Dunlap, Iowa. Jim Grady signed this invoice as the consignee (CX-84, 35; Tr. 204-211).

Mrs. Barbara Pearman, identified in Finding No. XXV, could find no record which showed there were any documents issued by the State of Oklahoma to Jim or James Grady for cattle consigned from Bristow, Oklahoma, to Dunlap, Iowa. See also General Finding No. 3. The record shows that 20 cow/calf pairs were transported from Bristow, Oklahoma to the Grady farm, Dunlap, Iowa, an interstate movement, and that Jim Grady ordered this movement. Further, that the records of the Oklahoma and Iowa Departments of Agriculture failed to show any documents issued to James Grady for the interstate transportation of the 20 cow/calf pairs.

Therefore, it must be found that James Grady moved, or caused to be moved interstate, 20 postparturient cows from Bristow, Oklahoma, to the Grady farm, Dunlap, Iowa, in violation of § 78.9(c)(3)(ii), because the cows were not accompanied by a certificate, as required.

XXX-XXXI

Mr. Robert Smith, Woodbine, Iowa, is a trucker who normally transports livestock and grain locally. He stated in his affidavit that on November 28, 1983, he was asked by another local trucker to haul a load of cattle for Jim Grady, Dunlap, Iowa. Jim Grady helped him load 16 or 17 cows from the Grady farm which he delivered to the Leonard Gramlich farm, Gretna, Nebraska. Although Jim Grady gave him directions to the consignee's farm, he did not give him any health papers or other documents to accompany the cattle. He could not recall whether Jim Grady or Pat Grady was the owner of the cattle. Jim Grady told him to bill Pat Grady for the transportation of the cattle (CX-55; Tr. 275-277).

Mr. Leonard Gramlich is a farmer/rancher and is President of Black Hills Farms, Inc., Gretna, Nebraska. While attending a cattle auction in Omaha, Nebraska, he talked with Mike Guilfoyle, owner of the Corn Belt Livestock Company, Omaha, Nebraska (Corn Belt), which is a livestock commission company, and advised him that he was interested in purchasing some cows. He was later

called by Mr. Guilfoyle and told that such cows as he was interested in were available at the Grady farm, Dunlap, Iowa. Mr. Guilfoyle gave him the price being asked for the cows but left it to Mr. Gramlich to make his own deal.

On November 26, 1983, Mr. Gramlich went to the Grady farm which was about 3 miles south of Dunlap, Iowa. There were three men there; however, he negotiated with the younger man who appeared to be approximately 30 years of age and told him he was one of the Grady sons. However, Mr. Gramlich couldn't identify him if he saw him. The cows which were being offered for sale were represented to Mr. Gramlich as being home raised cows, 1 year or older. He believed the latter to be true because they did not appear to have metal ear tags. He purchased 16 cows at the price quoted, which included delivery to his farm and for the Grady to obtain the necessary health papers to accompany the cows. These were predominantly black cows. The Grady's made arrangements for the transportation of the cows and told him they would take care of the necessary health papers.

When delivery of the 16 cows was made to Mr. Gramlich's farm at Gretna, Nebraska, on November 29, 1983, Mr. Gramlich asked the truck driver for the health papers and was told that they would be sent to him. No health papers accompanied the 16 cows and although Mr. Gramlich has called Corn Belt about the health papers, he has never received them. Additionally, he later determined the majority of the cows had ear tags. In response to an invoice received from Corn Belt, check no. 1418 dated November 8, 1983, in the amount of \$6,207.20, was issued by Mr. Gramlich to Corn Belt. A notation on the check showed that the amount of \$6,160.00 was in payment for "Grady, 16 bred cows, Dunlap," and that the amount of \$47.20 was paid as a commission to Corn Belt (CX-92, 93; Tr. 411-428).

It is clear from the record that Mr. Gramlich purchased 16 cows four years or older, from the Grady farm, Dunlap, Iowa, and that they were transported to his farm at Gretna, Nebraska, an interstate movement. It is also clear that Corn Belt was the middleman in the transaction since it billed Mr. Gramlich and was paid for the cattle but only received a commission for its part in the transaction. There is no evidence in this record which shows that the purchase price was paid to a specific Grady.

In both his affidavit and testimony Mr. Gramlich recounts that the cows were purchased at the Grady farm, and that the Grady son whom he dealt with was approximately 30 years of age. However, he stated that he could not identify this man if he saw him. In this regard, official notice is taken of the fact that there are at

the two Grady sons, James and Patrick, and that James Grady at his counsel's table during Mr. Gramlich's testimony. Mr. Smith did not point out James Grady as the person with whom he negotiated the purchase of the cattle. Further, the record does not contain any evidence showing the ages of James or Patrick. Nor does Mr. Gramlich's affidavit, or the remainder of his testimony, identify a specific Grady with whom he negotiated. However, I find that the statement of Mr. Smith is sufficient to support a finding that James Grady was the movant for this interstate shipment, i.e., that James Grady not only helped him load the cattle but gave him directions as to how to reach his destination. Although the remainder of the testimony of Mr. Gramlich is too inconclusive to identify any specific Grady, let alone James Grady as owner of these cattle for this movement, ownership of the cattle is not a necessary ingredient to a violation of these regulations. Section 78.1(m) defines "moved" as "... shipped, transported or otherwise moved or delivered or received for movement." Therefore, it must be found that James Grady moved, or caused to be moved interstate, sixteen cows, which were over two years of age from the Grady farm, Dunlap, Iowa, to Gretna, Nebraska, in violation of §§ 71.18 and 78.9(b)(3)(ii) of Title 9, Code of Federal Regulations, because the cows were not accompanied by an owner's shipment or other document listing individual identification; and were not accompanied by a certificate, as required.

XXXII

Mr. Lawrence Wayne Hunter is the owner of Wayne Hunter, Inc., Jordan, Montana, which is a trucking company. In his affidavit he stated that on or about December 3, 1983, he received a call from a truck to Hinsdale, Montana, to pick up a load of cattle. He was told that the cattle were to be transported for a Mr. Patrick. He dispatched truck driver, Gary Flint, to Hinsdale, Montana, to pick up the cattle (CX-48; Tr. 257-258).

Mr. Gary Flint, Jordan, Montana, is a truck driver for Wayne Hunter, Inc. In his affidavit he stated that on December 3, 1983, he dispatched to Hinsdale, Montana, to pick up a load of 60 cattle for Patrick Grady, Dunlap, Iowa. The cows were loaded at Hinsdale, Montana, on December 3, 1983. There were several trucks involved.

Patrick Grady was riding in one of the other trucks. The trucks stopped at Beach, North Dakota where Patrick Grady made a phone call after which he decided to send Mr. Flint's load of cattle to the Grady farm, Dunlap, Iowa, instead of some place in Minnesota. The cows were delivered to the Grady farm, Dunlap, Iowa, at about 8:00 p.m. on December 4, 1983 (CX-49; Tr. 258-259).

Mr. Vernon Zargdrager, South Sioux City, Iowa, is a truck driver for Livestock Express, Sioux City, Iowa. On or about December 4, 1983, his company sent two semi-trailer livestock trucks to Hinsdale, Montana, to transport cattle for Pat Grady, Dunlap, Iowa. The cattle were picked up at the Hinsdale Stockyards, Hinsdale, Montana. Mr. Zargdrager drove one truck and Mr. Kenny Jasper, Kingsley, Iowa, drove the other truck. Pat Grady rode with Mr. Zargdrager to and from Hinsdale, Montana. Between the two trucks they transported 108 head of cattle to the Grady farm, Dunlap, Iowa. A third truck from Montana transported an additional 60 head of cattle to the Grady farm. The cattle the two trucks picked up were heifers. As far as Mr. Zargdrager knew the cattle were owned by Pat Grady because of the way he talked. He based this on the fact that the sales barn would not allow the cattle to leave without payment and that Pat Grady obtained the clearance for the trucks to leave (CX-36; Tr. 212-216).

Testimony and affidavits of record show that a total of 168 head of cattle (3 truckloads), owned by Pat Grady, were transported from Hinsdale, Montana, to the Grady farm, Dunlap, Iowa, an interstate movement. Mr. Flint, in his affidavit, refers to his truckload as "cattle" and "cows". Mr. Zargdrager refers to the other two truckloads transported by his company as "cattle" or "heifers". The ordinary definition of a "heifer" is a young cow that has not given birth to a calf, and the term "cow" may be applied to any female bovine, whether young or old. Further, the term "cattle" is even more general, since it includes both cows and bulls.

This allegation of the amended complaint charges that this shipment of cattle violated § 78.9(b)(3)(ii). This section requires that the cattle described therein (2 years of age, or parturient or postparturient) must be accompanied by a certificate as defined in § 78.1(n). However, the evidence of record fails to show whether such certificate was required, since the age of the "cattle", "cows", or "heifers" has not been established. Nor does evidence of record reflect that any of these cattle were parturient or postparturient. Thus, a principal element of this violation is lacking in this record. I therefore find that complainant has failed to sustain the burden of proof of the allegation in this count, and that it must be dismissed.

Civil Penalty

The nature and characteristics of brucellosis, its devastating effects, as well as the federal/state/cooperation programs to prevent the spread and eradication of the disease, have previously been set forth. The disease and the potential economic impact upon producers, regardless of herd size, has been shown to be a costly experience. Because of this the regulations promulgated must be adhered

to, and enforced vigorously. Noncompliance with these regulations impedes the efforts of federal/state governments to eliminate or prevent the further spread of brucellosis in the United States.

Evidence of record shows that there were previous indiscretions on the part of the respondents in the interstate transportation of cattle. Both Patrick and James Grady received warnings concerning the requirements of the regulations and the necessity to comply with them. Patrick Grady was contacted by Compliance Officers of the United States Department of Agriculture (USDA) on October 17, 1982, and questioned concerning an interstate movement of cattle. He was uncooperative at the time and refused to provide the Compliance Officers with requested information on the interstate movement of the cattle. He was advised of the regulations and the necessity to comply with them. Later he received a warning letter, dated November 10, 1982, from the Chief Staff Veterinarian, Veterinary Services, USDA, for still another interstate movement of cattle where proper documents had not accompanied the shipment. In that letter he was again advised of the requirements of the regulation and was offered help on any questions he had concerning the interstate movement of cattle (CX-59; Tr. 132-134, 283).

James Grady was contacted on August 13, 1983, by a USDA Compliance Officer concerning still another interstate movement of cattle. He too was uncooperative. At that time, the regulations and their requirements for the interstate movement of cattle was explained to him at some length. He was again contacted by USDA Compliance Officers on November 17, 1983, at which time a written statement of the interview was made. Although James Grady did not sign the statement, he acknowledged its contents by reading it and initialling a correction he had requested to be made. The statement reflects that James Grady admitted that he had purchased cattle in several eastern states, but had not obtained health certificates for their interstate transportation "because the Vets are never around when we load the cattle". He also advised that ear-tags and other man-made identification were removed from most of the cattle since "people would not buy them if they knew where they come from" (CX-21; Tr. 136-139, 151, 262-264).

The affidavit of Mr. Leslie Brown shows eight shipments of mostly cow/calf pairs, the cows being over two years of age, being transported from the Mid-America Stockyards, Bristow, Oklahoma, to the Grady farm, Dunlap, Iowa, during the period June-August, 1983. The movement of these cattle was ordered by Jim Grady. Immediately after the cattle were unloaded at the Grady farm, they were put through a restraining chute where all ear-tags and other man-made identification were removed. Mr. Brown witnessed Jim

Grady removing ear tags from at least 150 cows, while Patrick Grady removed any backtags or other identification. Mr. Brown even assisted in removing ear tags on some of the occasions. James Grady told Mr. Brown if he were ever asked where the cows came from he was to say that they originated from "a NFO Station in southern Kansas" (CX-22, 58).

When questioned as to a health certificate and ear tags for the cows delivered to Mr. Mark Crisp on July 31, 1983, Pat Grady advised he could not provide a health certificate for the cows Mr. Crisp had purchased, and that any ear tags the cows may have had were removed because Pat Grady did not sell cows with ear tags (CX-74).

Dr. Dan Nielsen noted on September 7, 1983, when he examined the 31 cows purchased by Mr. Bob Ondracek from Jim Grady that none of the cows had metal ear tags, but that all of them had scabby holes which indicated that ear tags had been removed from the cows 2 or 3 weeks previous (Tr. 318).

Mr. Leon Kruger, a driver for the Sioux City Motor Express, transported cow/calf pairs for Jim Grady from Bristow, Oklahoma, to the Grady farm, Dunlap, Iowa, in September 1983. He stated that upon arrival at the Grady farm the yearlings in the shipment were put through a restraining chute where the ear tags were removed. The yearlings were later reloaded and transported to the Moorehead Sales Barn, Moorehead, Iowa (CX-84).

Dr. Richard N. Bruce noted upon examination of cows purchased in September 1983 by Mr. William Allemang from Jim Grady that some of the cows had holes in their ears indicating that they had previously been ear tagged (CX-17).

Dr. Doug Wurster has examined cattle for the Gradys for interstate movement on approximately six occasions during the ten months previous to November 17, 1983. He noted during these examinations that ear tags had obviously been removed from some of the cows (CX-52).

The record therefore reflects that over an extensive period of time the respondents had been made aware of, and indeed were aware of, the regulations and requirements governing the interstate movement of cattle. Nevertheless, on numerous occasions throughout the Findings, *supra*, they deliberately chose to ignore them. Indeed, their actions show a pattern of disdain and utter disregard for the regulations. Such actions denigrate, debase and undermine the brucellosis eradication program by defeating federal/state efforts to properly trace movements of exposed animals and prevent the spread and exposure to non-contaminated cattle.

Nor do respondents contentions that the "spirit of the law" was complied with since the record fails to disclose any of the cattle transported were found to have brucellosis; that it did not make any difference whether an intrastate or interstate health certificate accompany the shipments; and that they did not intentionally violate 9 CFR § 78.9(b)(3)(ii), have merit. As noted previously, the intrastate health certificates lack the detail required by 9 CFR 78.1(n). One of the purposes of the interstate health certificate is to alert officials of a receiving state so that they may determine whether such cattle require testing. Further, the intrastate health certificate remains in the origin state and is not forwarded to the proper destination state since it lacks the correct consignee and destination. With regard to "intent", the record as a whole shows a deliberate and wilful pattern of total disregard for the regulations. Additionally, "intent" to violate the regulations is not a requirement of the provisions of 21 U.S.C. § 122.

Finally, it is noted that respondents failed to take the stand and testify concerning the alleged violations. A well settled principle that has been followed in many proceedings before the Department of Agriculture is that failure to testify raises the inference that any testimony respondents would have given would have been adverse to their positions and that the *prima facie* case which the complainant presented here would have been bolstered if they had chosen to testify. See *In re Apex Meat Company*, 44 Agric. Dec. ____ (Sept. 5, 1985) (Slip opinion, pages 32-33), and cases and authority cited therein.

Section 122 of Title 21 of the United States Code provides for the assessment of a civil penalty "of not more than one thousand dollars" for each violation of the regulations published pursuant to authority granted to the Secretary of Agriculture in §§ 111 and 120 of Title 21 of the United States Code.

Sections 111 and 120 of Title 21 of the United States Code authorizes the Secretary of Agriculture to issue regulations which govern the interstate transportation of animals from any place where communicable disease exists or where he may have reason to believe it exists. The Secretary has issued such regulations governing the interstate transportation of cattle, as here pertinent, 9 CFR §§ 71.18, 78.9(b)(3)(ii) and 79.9 (c)(3)(ii). Each is a separate and distinct violation subject to the maximum civil penalty of \$1,000. The complainant here seeks the maximum civil penalty assessment for each proven violation. Severe sanctions for violations of the Department's regulations has been an established policy. *In re Braxton Worsley*, 33 Agric. Dec. 1547, 1556-71 (1974); see also *In re Donald Hageman, S&H Hogs, Inc., et al.*, 42 Agric. Dec. 531, 546

(1983) and cases cited therein. The evidence of record is void of any mitigating or extenuating circumstances which would lessen the assessment of the maximum penalty. Rather, the evidence support the requested \$1,000 civil penalty for each violation alleged and proven as appropriate to accomplish the goals of compliance and deterrence of respondents and others similarly situated.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondents contend that there is not sufficient evidence to support the ALJ's findings of fact. However, in view of the massive amount of evidence supporting the findings of fact, no useful purpose would be served by responding in detail to respondents' contentions.² In addition, notwithstanding the massive evidence introduced by complainant, respondents failed to testify. Under the settled principle that has been followed in many proceedings before this Department,³ and which has been followed in many judicial

² Complainant's Reply to Respondent's Appeal discusses respondents' contentions in detail. I agree with complainant's arguments.

³ E.g., *In re Haring Meats and Delicatessen, Inc.*, 44 Agric. Dec. ____ (Oct. 17, 1985); *In re Saylor*, 44 Agric. Dec. ____ (Sept. 20, 1985); *In re Petty*, 43 Agric. Dec. ____ (Oct. 31, 1984), appeal docketed, No. 3-84-2200-R (N.D. Tex. Dec. 19, 1984); *In re Jovine Produce Farms, Inc.*, 42 Agric. Dec. ____ (Oct. 6, 1983); *In re Farrow*, 42 Agric. Dec. ____ (Sept. 21, 1983), *aff'd in part and rev'd in part*, No. 83-2548 (8th Cir. Apr. 24, 1985) (merits affirmed; suspension reversed); *In re Mattes Livestock Auction Market, Inc.*, 42 Agric. Dec. 81, 101-02, *aff'd*, 721 F.2d 1125, 1139 (7th Cir. 1983); *In re Stampfer*, 42 Agric. Dec. 29, 32 n.4 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984); *In re De Graaf Dairies, Inc.*, 41 Agric. Dec. 385, 402-03 (1982), *aff'd*, No. 82-1157 (D.N.J. Jan. 24, 1983), *aff'd mem.*, 725 F.2d 667 (3d Cir. 1983); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1507 (1981), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff'd* (unpublished), 742 F.2d 1462 (9th Cir. 1984); *In re Great Western Poultry Co.*, 38 Agric. Dec. 1358, 1363-64 (1980), *aff'd*, No. CV 81-0534 (C.D. Cal. Sept. 30, 1981); *In re Parra*, 38 Agric. Dec. 1271, 1276-77 (1979); *In re Wilcox*, 37 Agric. Dec. 1650, 1606-07 (1978); *In re Central Ark. Auction Sale, Inc.*, 37 Agric. Dec. 570, 586-87 (1977), *aff'd*, 570 F.2d 724 (8th Cir.) (2-1 decision), *cert. denied*, 436 U.S. 937 (1978); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 298, 305, *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978); *In re Burrus*, 36 Agric. Dec. 1608, 1650-57 (1977), *aff'd per curiam*, 575 F.2d 1258 (8th Cir. 1978); *In re DeLong Poultry Co.*, 35 Agric. Dec. 607, 627-38 (1977), *aff'd*, 618 F.2d 1329 (8th Cir.) (2-1 decision), *cert. denied*, 449 U.S. 1081 (1980); *In re Loretz*, 36 Agric. Dec. 1087, 1100-01 (1977); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1532, 1558 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 988 (1978); *In re Whaley*, 35 Agric. Dec. 1519, 1522 (1976); *In re Cosca*, 34 Agric. Dec. 1917, 1929-30 (1975); *In re Wursley*, 33 Agric. Dec. 1547, 1571-72 (1974); *In re Trenton Livestock, Inc.*, 33 Agric. Dec. 499, 514 (1974), *aff'd per curiam* (unpublished), 510 F.2d 966 (4th Cir. 1975); *In re Speight*, 33 Agric. Dec. 280, 300-01 (1974); *In re Sy B. Guiber & Co.*, 31 Agric. Dec. 474, 489 (1972).

proceedings,⁴ I infer, as the ALJ did, that their testimony would have been adverse to their position here. "It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other to have contradicted." Lord Mansfield, in *Blatch v. Archer*, Cowp. 66, quoted with approval in *Wigmore, Evidence* (3d ed. 1940), § 285.

Respondents argue that the ALJ erroneously excluded evidence which they contend would show that certain animals not involved in this case that tested positive to the brucellosis card test were permitted to move in violation of the regulations. That evidence was properly excluded. Even if respondents were able to show that the regulations were not scrupulously followed in certain particular instances where animals should not have been moved under the regulations, that would not be a defense to respondents' failure to obtain the required health certificates, and to have the proper documentation and identification for their animals.

The evidence here shows that the maximum civil penalty should be assessed against respondents. They had a total disregard for the requirements designed to prevent the spread of brucellosis. They ignored instructions given by regulatory officials and truckers as to the need for health certificates.

The brucellosis eradication program is important to the national welfare. To date, the program has cost in excess of \$1 billion. It costs about \$150 million a year (Tr. 440). There is no excuse for respondents' complete disregard of the regulatory requirements.

In their appeal, respondents contend that Count XXV of the amended complaint should have been dismissed. As complainant points out, the ALJ did dismiss Count XXV. Complainant also argues that the record supports the allegations of Count XXV of the amended complaint, but complainant did not file a cross-appeal, and complainant requests that "Respondents' Appeal Petition be dismissed and that the Judicial Officer affirm the Adminis-

⁴ 2 *Wigmore, Evidence* §§ 285-91 (3d ed. 1940); *United States v. Dr. RE*, 332 U.S. 581, 593 (1948); *Interstate Circuit v. United States*, 306 U.S. 208, 225-27 (1939); *Kirby v. Tullwadge*, 100 U.S. 373, 383 (1866); *Karnovs Company, Etc. v. Atlantica Export Corporation*, 588 F.2d 1, 9-10 (2d Cir. 1978); *International Union v. NLRB*, 455 F.2d 1357, 1362-70 (D.C. Cir. 1971); *Milbank Mut. Ins. Co. v. Wentz*, 352 F.2d 592, 597 (8th Cir. 1955); *Crowling v. Pittsburgh & Lake Erie R.R. Co.*, 327 F.2d 142, 148-49 (3d Cir. 1963); *Hoffman v. CIR*, 298 F.2d 784, 788 (3d Cir. 1962); *Illinois Central R.R. Co. v. Staples*, 272 F.2d 823, 834-35 (8th Cir. 1959); *Neidhoefer v. Automobile Ins. Co. of Hartford, Conn.*, 182 F.2d 209, 270-71 (7th Cir. 1950); *Boyles v. Levin*, 151 F.2d 615, 619 (7th Cir.), cert. denied, 327 U.S. 805 (1946); *Longini Shoe Mfg. Co. v. Ratcliff*, 108 F.2d 253, 255-57 (C.C. P.A. 1939); *NLRB v. Remington Rand, Inc.*, 94 F.2d 802, 807-68 (2d Cir.), cert. denied, 304 U.S. 576 (1938).

trative Law Judge's Decision and Order" (Complainant's Reply 20). This further indicates that complainant was not seeking reversal of the ALJ's ruling as to Count XXV.

For the foregoing reasons, the following order should be issued:

ORDER

IT IS ORDERED, that

1. Counts XX, XXI, XXII and XXXII be dismissed as to Patrick J. Grady, and that Count XXV be dismissed as to James Grady.

2. Respondent, James Grady, is assessed a total civil penalty of \$22,000 for the violations as set forth in the Findings, *supra* (\$1,000 each—VI, VII, IX, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX, XXI, XXII, XXIII, XXIV, XXVI, XXVII, XXVIII, XXIX, XXX and XXXI).

3. Respondent, Patrick J. Grady, is assessed a total civil penalty of \$5,000 for the violations set forth in the Findings, *supra* (\$1,000 each—II, III, IV, X, XI).

4. Respondent, Rose Mary Grady, is assessed a total civil penalty of \$2,000 for the violations set forth in the Findings, *supra* (\$1,000 each—V and VIII).

5. The above civil penalties shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded by each respondent to Thomas E. Bundy, Esq., Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within 10 days after service of this order on such respondent.

Appendix A

Pertinent Statute and Regulations

Title 21, United States Code, § 122 provides that:

Any person, company, or corporation knowingly violating the provisions of this Act or the orders or regulations made in pursuance thereof shall be guilty of a misdemeanor, and on conviction shall be punished by a fine of not less than one hundred dollars nor more than five thousand dollars, or by imprisonment not more than one year, or by both such fine and imprisonment. Any person, company, or corporation violating such provisions, orders, or regulations may be assessed a civil penalty by the Secretary of Agriculture of not more than one thousand dollars. The Secretary may issue an order assessing such civil penalty only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order

reviewable under chapter 158 of title 28, United States Code [28 U.S.C. §§ 2341 *et seq.*]. The validity of such order may not be reviewed in an action to collect such civil penalty.

Title 21, United States Code, § 111 provides that:

The Secretary of Agriculture shall have authority to make such regulations and take such measures as he may deem proper to prevent the introduction or dissemination of the contagion of any contagious, infectious, or communicable disease of animals and/or live poultry from a foreign country in the United States or from one State or Territory of the United States or the District of Columbia to another, and to seize, quarantine, and dispose of any hay, straw, forage, or similar material, or any meats, hides, or other animal products coming from an infected foreign country to the United States, or from one State or Territory or the District of Columbia in transit to another State or Territory or the District of Columbia whenever in his judgment such action is advisable in order to guard against the introduction or spread of such contagion.

Title 21, United States Code, § 120 provides that:

In order to enable the Secretary of Agriculture to effectually suppress and extirpate contagious pleuropneumonia, foot-and-mouth disease, and other dangerous contagious, infectious, and communicable disease in cattle and other livestock and/or live poultry, and to prevent the spread of such diseases, he is authorized and directed from time to time to establish such rules and regulations concerning the exportation and transportation of livestock and/or live poultry from any place within the United States where he may have reason to believe such diseases may exist into and through any State or Territory, and into and through the District of Columbia and to foreign countries as he may deem necessary, and all such rules and regulations shall have the force of law.

Title 9, Code of Federal Regulations, § 71.18 provides, in relevant part that:

(a) No cattle 2 years of age or over . . . shall be moved interstate other than in accordance with the requirements of this section. All interstate movements of any cattle

* Other document means a shipping permit, an official health certificate, an official brand inspection certificate, a bill of lading, a waybill, or an invoice on which is listed the required information.

* * * * *

(3) Each person who ships, transports, or otherwise causes the movement of the cattle interstate is responsible for the identification of the animals as required by this section. No such person shall remove or tamper with or cause the removal of or tampering with an identification backtag or eartag required in this section for interstate movement of animals, except as he authorized by the Deputy Administrator, Veterinary Services, upon request in specific cases and under such conditions as he may impose to insure continuing identification."

Title 9, Code of Federal Regulations, § 78.9 provides, in relevant part, that:

"Cattle from herds not known to be affected with brucellosis must be moved interstate in compliance with § 71.18 of this subchapter, except where specifically exempt, and then only as follows:

* * * * *

(b) *Class A States.* If such cattle originate in a Class A State and are non-vaccinates under 18 months of age, or are official calfhood vaccinates of the beef breeds under 24 months of age, or are official calfhood vaccinates of the dairy breeds under 20 months of age, unless they are parturient or postparturient, may be moved interstate without being tested for brucellosis. If such cattle originate in a Class A State and are non-vaccinates over 18 months of age, are official calfhood vaccinates of the beef breeds over 24 months of age, are official calfhood vaccinates of the dairy breeds over 20 months of age, or if they are parturient or postparturient, they may only be moved

interstate from such area under the conditions specified below:

(1) *Movement for immediate slaughter.*

* * * * *

(2) *Movement to quarantined feedlots.*

* * * * *

(3) *Movement other than in accordance with paragraphs (b)(1) and (2) of this section.* Such cattle may be moved interstate other than in accordance with paragraphs (b)(1) and (2) of this section only if:

* * * * *

(i) Such cattle are subjected to an official test for brucellosis and found negative for brucellosis within 30 days prior to such interstate movement, and accompanied interstate by a certificate, and the certificate shows in addition to items required under § 78.1(n), the test dates and results of the official brucellosis tests; or

* * * * *

(c) *Class B States.* If such cattle originate in a Class B State and are non-vaccinates under 18 months of age, or are official calfhood vaccinates of the beef breeds under 24 months of age, or are official calfhood vaccinates of the dairy breeds under 20 months of age, unless they are parturient or postparturient, they may be moved interstate without being tested for brucellosis. If such cattle originate in a Class B state and are non-vaccinates over 18 months of age, or are official calfhood vaccinates of the beef breeds over 24 months of age, or are official calfhood vaccinates of the

dairy breeds over 20 months of age, or if they are
perturient or postparturient and under these ages,
they may only be moved interstate from such area
under the conditions specified below:

(1) *Movement for immediate slaughter.*

* * * * *

(2) *Movement to quarantined feedlots.*

* * * * *

(3) *Movement other than in accordance
with paragraphs (c)(1) and (2) of this sec-
tion. Such cattle may be moved interstate
other than in accordance with paragraphs
(c)(1) and (2) of this section only if:*

* * * * *

(ii) Such cattle are subjected to an official
test for brucellosis and found negative for
brucellosis within 30 days prior to interstate
movement, are accompanied interstate by a
certificate which shows, in addition to items
required under § 78.1(n), the test dates and re-
sults of the official brucellosis tests, and if
such cattle are accompanied interstate by a
"Permit for Entry"; or"

Title 9, Code of Federal Regulations, § 78.1(n) defines "certificate"
to be:

An official document issued by a Veterinary Services
representative, State representative, or accredited veteri-
narian at the point of origin of a shipment of domestic ani-
mals which shows the official metal eartag, individual
animal registered breed association registration tattoo, or
individual animal registered breed association registration
brand, or registration number or similar individual identi-
fication of each animal to be moved, the number of ani-
mals covered by the document, the purpose for which the
animals are to be moved, the points of origin and destina-

tion, the consignor, and the consignee, and which states that the animal or animals identified on the certificate meets the requirements of 9 CFR Part 78 for interstate movement.

Title 9, Code of Federal Regulations, § 78.1(m) defines "moved" as
[s]hipped, transported, or otherwise moved, or delivered or received for movement.

Title 9, Code of Federal Regulations, § 78.1(ccc) defines "parturient" as:

[v]isibly prepared to give birth or within 2 weeks of giving birth.

Title 9, Code of Federal Regulations, § 78.1(ddd) defines "postparturient" as:

[h]aving already given birth.

In re: ROLAND SCHUELIN. A.Q. Docket No. 206. Decided January 9, 1986.

Sherrie Kopka Kennedy, for complainant.
Respondent, pro se.

Decision by John A. Campbell, Administrative Law Judge.

ORDER GRANTING MOTION TO DISMISS

For good cause shown, Complainant's motion to dismiss the complaint in this proceeding is granted.

In re: MICHAEL C. BAILEY. A.Q. Docket No. 205. Decided February 5, 1986.

Interstate cattle movement.

Sherrie Kopka Kennedy, for complainant.
Respondent, pro se.

Decision by Dorothea A. Baker, Administrative Law Judge.

DEFAULT DECISION AND ORDER

PRELIMINARY STATEMENT

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111, 120, and 122), by a Com-

plaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The Complaint alleged that Respondent violated sections 111 and 120 of the Act (21 U.S.C. §§ 111 and 120) and section 78.9(c)(3) of the regulations promulgated thereunder (9 CFR § 78.9(c)(3)).

Copies of the complaint and the Rules of Practice governing proceedings under the Act were served by the Hearing Clerk, by certified mail, upon respondent on August 30, 1985.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) applicable to this proceeding, Respondent was informed in the Complaint and the letter of service that an Answer should be filed with the Hearing Clerk within twenty (20) days after service of the Complaint, and that failure to file an answer either denying, admitting, or explaining the allegations in the Complaint and requesting an oral hearing would constitute an admission of such allegations and a waiver of such hearing. On September 24, 1985, Respondent was sent, by regular mail, a notice that his Answer had not been received by the Hearing Clerk in the allotted time. More than twenty (20) days have elapsed since Respondent was served with the Complaint in question. Respondent has not filed an answer to date. This Decision and Order, therefore, is issued pursuant to sections 1.136 and 1.139 of the Rules of Practice applicable to this proceeding (7 CFR §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the Complaint, which are admitted by Respondent's failure to file an Answer, are adopted and set forth herein as the findings of fact.

FINDINGS OF FACT

1. Michael C. Bailey, Respondent, is an individual whose address is Route 1, Woodland, Alabama 36280.

2. On or about January 25, 1984, the respondent moved, from Randolph County, Alabama, within a class B state, to Bowden, Georgia, approximately five (5) postparturient cows in violation of section 78.9(c)(3) of the regulations (9 CFR § 78.9(c)(3)) because the cows were not accompanied by a certificate or other document, as required.

3. On or about January 25, 1984, the respondent moved, from Randolph County, Alabama, within a class B state, to Bowden, Georgia, approximately five (5) postparturient cows in violation of section 78.9(c)(3) of the regulations (9 CFR § 78.9(c)(3)) because the cows were not accompanied by a "Permit for Entry," as required.

4. On or about February 13, 1984, the respondent moved, from Randolph County, Alabama, within a class B state, to Bowden, Georgia, approximately one (1) postparturient cow in violation of

section 78.9(c)(3) of the regulations (9 CFR § 78.9(c)(3)) because the cow was not accompanied by a certificate or other document, as required.

5. On or about February 13, 1984, the respondent moved, from Randolph County, Alabama, within a class B state, to Bowden, Georgia, approximately one (1) postparturient cow in violation of section 78.9(c)(3) of the regulations (9 CFR § 78.9(c)(3)) because the cow was not accompanied by a "Permit for Entry," as required.

CONCLUSION

By reason of the facts in the findings of fact set forth above, Respondent has violated the Act and regulations promulgated thereunder. Therefore, the following Order is issued.

ORDER

Michael C. Bailey is assessed a civil penalty of two thousand dollars (\$2,000) (\$500.00 per violation) which shall be paid within thirty (30) days from the date this Order becomes effective. This civil penalty shall be made payable to "Treasurer of the United States," by certified check or money order, and shall be forwarded to Sherrie Kopka Kennedy, U.S. Department of Agriculture, Office of the General Counsel, Room 2422 South Building, Washington, D. C. 20250-1400.

This Order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon Respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[The Default Decision and Order became final on February 4, 1986.—Ed.]

In re: BROOKS GRUFFIN. A.Q. Docket No. 210. Decided February 12, 1986.

Interstate movement of brucellosis-exposed cattle.

Jury Rules, for complainant.

Ralph C. Murray, West Helena, Arkansas, for respondent.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120), by a complaint

filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Brooks Griffin, respondent, violated the Act and regulations promulgated thereunder (9 CFR § 78.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent, Brooks Griffin, specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirements that the final decision in this proceeding contain allegations and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Brooks Griffin, respondent, is an individual whose address is Route 3, Elaine, Arkansas 72333.

2. On or about December 4, 1984, the respondent moved interstate at least four brucellosis exposed cattle from Arkansas, to the South Memphis Stockyards at Memphis, Texas.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of four hundred dollars (\$400.00). The respondent shall make payment by sending a certified check or money order payable to the "Treasurer of the United States," to Jara Ruley, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Wash-

ington, D. C. 20250-1400, not later than thirty (30) days from effective date of this order.

This order shall become effective on the day upon which service of this order is made upon respondent.

In re: Dr. Jack B. Ross. VA Docket No. 34. Decided February 1986.

Breucellus test records.

Clement J. McGovern, for complainant.

Alice Dale Goodsell, Jackson, Mississippi, for complainant.

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the regulations governing the Accreditation of Veterinarians and Suspension or Revocation of such Accreditation (9 CFR § 160.1 et seq.), hereinafter referred to as the regulations, by a Complaint filed by the Administrative Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent violated the Standards for Accredited Veterinarians (9 CFR §§ 161.2(d) and (e)). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, admits the Finding of Facts set forth

U.S.C. § 504 et seq.) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Dr. Jack B. Ross, hereinafter referred to as the respondent, is an individual whose address is P.O. Box 8827, Jackson, Mississippi 39204.

2. Respondent is now, and at all times material herein was, a Doctor of Veterinary Medicine and an Accredited Veterinarian in the State of Mississippi under the provisions of the regulations of the Code of Federal Regulations, Parts 160-162.

3. Respondent, on or about December 9, 1983, signed and submitted brucellosis test records 295045A through 295056A regarding the brucellosis testing of approximately 143 cattle for Gaddis Farms which were not accurately and fully completed because respondent indicated it was a fee basis test when in fact it was a private test, the respondent failed to properly record the results of the BBA card test utilized at the farm.

4. Respondent on or about December 9, 1983, performed a brucellosis test on approximately 143 cattle for Gaddis Farms other than in accordance with Federal and State regulations and instructions issued to him by the Veterinarian-in-Charge or the State Animal Health Official, or both, because he ran the BBA card test on the blood drawn from such cattle.

5. Respondent, on or about April 2, 1984, signed and submitted brucellosis test records 222132A through 222141A regarding the brucellosis testing of approximately 140 cattle for Gaddis Farms which were not accurately and fully completed because respondent indicated it was a fee basis test when in fact it was a private test, the respondent failed to properly record the results of the BBA card test utilized at the farm.

6. Respondent, on or about April 2, 1984, performed a brucellosis test on approximately 140 cattle for Gaddis Farms other than in accordance with Federal and State regulations and instructions issued to him by the Veterinarian-in-Charge or the State Animal Health Official, or both, because he ran the BBA card test on the blood drawn from such cattle.

7. Respondent, by reason of the facts contained in paragraphs 3, 4, 5, and 6 above, failed to keep himself currently informed on procedures applicable to disease control and eradication programs.

8. Respondent on or about December 1, 1984, signed and issued to Gaddis Cattle Co. a State of Mississippi official health certificate, No. 169, which was not fully completed, as required. Specifically, the health certificate was signed and issued by the respondent

without showing the consignee, number and weight of the meat it covered.

9. Respondent, on or about December 1, 1984, in connection with the facts contained in paragraph 8 above, failed to take proper precautions to prevent misuse of certificates used in his work as an accredited veterinarian.

10. Respondent by reason of the facts contained in paragraphs 4, 5, 6, 7, 8 and 9 above, failed to carry out all of his responsibilities under the applicable Federal Programs and cooperative programs in accordance with Federal and State regulations and instructions issued to him by the Veterinarian-in-Charge or the state Animal Health Official, or both.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order of disposition of this proceeding, such order and decision will be issued.

ORDER

1. Respondent's veterinary accreditation is hereby suspended from January 27, 1986, to April 26, 1986, provided, that, if the respondent performs any actions during such suspension for which veterinary accreditation is required, then respondent's veterinary accreditation shall be revoked. Before such action is taken, the respondent will be afforded an opportunity for a hearing concerning the matter.

2. This order shall have the same force and effect as if entered after full hearing and shall become effective on the day upon which service of this order is made upon the respondent.

In re: KENNETH E. MARBLE, A.Q. Docket No. 218. Decided February 13, 1986.

Interstate movement of cattle.

Joseph P. Pembroke, for complainant.

William W. Ferguson, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 1903, as amended, (Act) (21 U.S.C. §§ 111, 120 and 122) by a cer

plaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Kenneth E. Marble, respondent violated the Act and regulations promulgated thereunder (9 CFR § 78.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or bases hereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Kenneth E. Marble, respondent, is an individual whose mailing address is Route 3, Box 40E, Terry, Mississippi 39170.

2. On or about March 26, 1983, respondent shipped interstate 43 adult cattle from Terry, Mississippi, to Chicot County, Arkansas.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of the proceeding, such order and decision will be issued.

culture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day this order is served upon the respondent.

In re: WAYNE SANDERS. A.Q. Docket No. 224. Decided February 13, 1986.

Interstate movement of cattle.

Jura Buxy, for complainant.

Respondent, *pro se*.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120), by a complaint filed by the Acting Administrator of the Animal and Plant Health Inspection Service alleging that Wayne Sanders, respondent, violated the Act and regulations promulgated thereunder (9 CFR § 78.9(c)(3)). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

- (a) Any further procedure;
- (b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;
- (c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Wayne Sanders, respondent, is an individual whose address is Route 2, Franklin, Georgia 30217.

2. On or about April 1, 1985, the respondent moved four cattle, over two years of age, interstate from Ranburne Livestock Sales, Inc., Ranburne, Alabama, to his premises at Franklin, Georgia.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of one thousand dollars (\$1,000.00). The respondent shall send a certified check or money order for \$1,000.00 payable to the "Treasurer of the United States," to Jaru Ruley, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: GEORGE WHITTEN. A.Q. Docket No. 137. Decided February 20, 1986.

Interstate movement of cattle.

Joseph Pembroke, for complainant.

Respondent, pro se.

Decision by Victor W. Palmer, Administrative Law Judge.

DEFAULT DECISION AND ORDER

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111, 120, and 122) (Act) by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that respondent has violated sections 111 and 120 of the Act (21 U.S.C. § 111 and § 120) and section 78.9(d)(3)(iii) of the regulations promulgated thereunder (9 CFR § 78.9(d)(3)(iii)).

Copies of the complaint of the Rules of Practice governing proceedings under the Act were personally served upon respondent on December 19, 1984.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) applicable to this proceeding, respondent was informed in the complaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer either denying, admitting or explaining the allegations in the complaint and requesting an oral hearing would constitute an admission of such allegations and waiver of such hearing. More than twenty (20) days have elapsed since respondent was served with the complaint in question. Respondent has not filed an answer to date. This Decision and Order therefore, is issued pursuant to sections 1.136 and 1.139 of the Rules of Practice applicable to this proceeding (7 CFR §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as the findings of fact.

FINDINGS OF FACT

1. George Whitten, is an individual whose mailing address is Route 1, Blue Springs, Mississippi 38652.
2. On or about September 28, 1983, respondent shipped one cow from Corinth, Mississippi to Savannah, Tennessee, in violation of section 78.9(d)(3)(iii) of the regulations (9 CFR § 78.9(d)(3)(iii)), because the cow was not accompanied by a certificate as required.
3. On or about September 28, 1983, respondent shipped interstate one cow from Corinth, Mississippi to Savannah, Tennessee, in violation of section 78.9(d)(3)(iii) of the regulations (9 CFR § 78.9(d)(3)(iii)), because the cow was not accompanied by a "Permit for Entry", as required.
4. On or about September 28, 1983, respondent shipped interstate one cow from Corinth, Mississippi to Savannah, Tennessee, in violation of section 71.18 of the regulations (9 CFR § 71.18), because the cow was moved interstate unaccompanied by an owner's statement or other document containing prescribed information, as required.
5. On or about November 2, 1983, respondent shipped interstate (2) two cows from Corinth, Mississippi to Savannah, Tennessee, in violation of section 78.9(d)(3)(iii) of the regulations (9 CFR § 78.9(d)(3)(iii)), because the cattle were not accompanied by a certificate, as required.

6. On or about November 2, 1983, respondent shipped interstate two cows from Corinth, Mississippi to Savannah, Tennessee, in violation of section 78.9(d)(3)(iii) of the regulations (9 CFR § 78.9(d)(3)(iii)), because the cattle were not accompanied by a "Permit for Entry", as required.

7. On or about November 2, 1983, respondent shipped interstate (2) two cows from Corinth, Mississippi to Savannah, Tennessee, in violation of section 71.18 of the regulations (9 CFR § 71.18), because the cattle were moved interstate unaccompanied by an owner's statement or other document containing prescribed information, as required.

8. On or about February 1, 1984, respondent shipped interstate four (4) cows from Corinth, Mississippi to Savannah, Tennessee, in violation of section 78.9(d)(3)(iii) of the regulations (9 CFR § 78.9(d)(3)(iii)), because the cattle were not accompanied by a certificate, as required.

9. On or about February 1, 1984, respondent shipped interstate four (4) cows from Corinth, Mississippi to Savannah, Tennessee, in violation of section 78.9(d)(3)(iii) of the regulations (9 CFR § 78.9(d)(3)(iii)), because the cattle were not accompanied by a "Permit for Entry", as required.

10. On or about February 1, 1984, respondent shipped interstate four (4) cows from Corinth, Mississippi to Savannah, Tennessee, in violation of section 71.18 of the regulations (9 CFR § 71.18), because the cows were moved interstate unaccompanied by an owner's statement or other document containing prescribed information, as required.

CONCLUSIONS

By reason of the facts in the findings of fact set forth above, respondent has violated the Act and regulations promulgated thereunder. Therefore, the following order is issued.

ORDER

Respondent is hereby assessed civil penalty of (\$4,500) four thousand five hundred dollars which shall be payable to the "Treasurer of the United States" by certified check and money order, and shall be forwarded to Joseph P. Pembroke, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days (7 CFR § 1.142(e)) after service of this Decision and Order upon respondent,

unless there is an appeal to the Judicial Officer within 30 days pursuant to section 1.145 of the Rules of Practice applicable to the proceeding (7 CFR § 1.145).

[The Default Decision and Order became final on February 3, 1986.—Ed.]

In re: JOHNNY HICKS. A.Q. Docket No. 173. Decided February 2, 1986.

Interstate movement of cattle.

Jana Raley, for complainant.

Dan Gillespie, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 1, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Johnny Hicks, respondent, violated the Act and regulations promulgated thereunder (9 CFR § 78.9(d)). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

- (a) Any further procedure;
- (b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;
- (c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by respondent in connection with the proceeding.

FINDINGS OF FACT

1. Johnny Hicks, respondent, is an individual whose mailing address is Route 1, Box 162, Magnolia, Arkansas 71753.

2. On or about September 17 and 24, 1984, the respondent moved cattle interstate from the Homer Livestock Commission Company, Homer, Louisiana, to the Magnolia Livestock Auction, Magnolia, Arkansas.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of one thousand dollars (\$1,000.00). The respondent shall send a certified check or money order for \$1,000.00 payable to the "Treasurer of the United States," to Jara Raley, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: GLEN E. NICHOLS, A.Q. Docket No. 209. Decided February 20, 1985.

Interstate movement of cattle.

Kris Ikejiri, for complainant.

Wyle Board, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Act of February 2, 1903, as amended, (Act) (21 U.S.C. § 111 and § 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Glen E. Nichols violated the Act and regulations promulgated thereunder (9 CFR § 71.1 *et seq.*, and § 78.1 *et seq.*) Glen E. Nichols and the complainant have agreed that this

proceeding should be terminated by entry of the Consent Decision set forth and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, Glen E. Nichols admits specifically to the Secretary of the United States Department of Agriculture his jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or basis thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Glen E. Nichols also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 et seq.) for fees and other expenses incurred by him in connection with this proceeding.

FINDINGS OF FACT

1. Glen E. Nichols, respondent herein, is an individual whose mailing address is Route 6, Box 401, Clarksville, Texas 75426.

2. On or about January 7, 1985, the respondent moved interstate from Clarksville, Texas, to DeQueen, Arkansas, approximately six (6) cattle.

CONCLUSIONS

Respondent Glen E. Nichols, having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

Respondent Glen E. Nichols is assessed a civil penalty of nine hundred dollars (\$900.00) which shall be payable to the "Treasury of the United States", by certified check or money order, which shall be forwarded to Kris H. Ikejiri, Office of the General Counsel, Room 2422 South Building, U.S. Department of Agriculture, Washington, D.C. 20250-1400. Payments shall be paid as follows:

This Consent Decision and Order shall become effective on the day of service upon the respondent.

In re: CLIFFORD RUSSELL. A.Q. Docket No. 217. Decided February 28, 1986.

Intersate movement of cattle.

Robert L. Broussard, for complainant.

Respondent, pro se.

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act (21 U.S.C. §§ 111 and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Clifford Russell, respondent, violated the Act and regulations promulgated thereunder (9 CFR § 91.1 et seq.). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or bases thereof; and

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision.

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980

(5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Clifford Russell, respondent, is an individual whose mailing address is General Delivery, Plato Center, Illinois 60170.

2. On or about April 30, 1985, respondent moved two (2) head of cattle from Burlington, Wisconsin, to Laredo, Texas.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of the proceeding, such order will be issued.

ORDER

The respondent is assessed a civil penalty of two hundred and fifty (\$250) which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Robert L. Broussard, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon respondent.

In re: HARRY RATLIFF. A.Q. Docket No. 219. Decided February 3, 1986.

*Robert L. Broussard, for complainant.
Respondent, pro se.*

Decision by Dorothea Baker, Administrative Law Judge.

COMPLAINT DISMISSED

Upon Motion filed January 31, 1986, the Complaint filed herein on November 25, 1985, is hereby dismissed with prejudice.

Copies hereof shall be served upon the parties.

In re: CITY OF HOPE NATIONAL MEDICAL CENTER. AWA Docket No. 364. Decided February 6, 1986.

violations of the Animal Welfare Act.

Donald Tracy, Mktg. Div. OGC, for complainant.

John McDermott, Washington D.C., for respondent.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. 2131 *et seq.*), ("Act") by a Complaint filed by the Administrator, Animal and Plant Health Inspection Service ("APHIS"), United States Department of Agriculture, charging that respondent violated the Act and the regulations and standards issued thereunder (9 CFR Parts 1, 2, and 3§ 0. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to these proceedings (7 CFR § 1.138).

The respondent admits the jurisdictional allegations contained in the complaint, specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, and waives oral hearing and further procedure. Complainant and respondent agree for the purpose of settling this proceeding to the entry of this decision.

FINDINGS OF FACT

1. Respondent, the City of Hope National Medical Center, has a mailing address of 1500 East Duarte Road, Duarte, California 91010.

2. At all times material herein respondent operated a research facility registered under the Act.

3. At the time of its original application for registration, respondent received a copy of the regulations and standards contained in 9 CFR Chapter 1, Subchapter A, and agreed in writing to comply with said standards and regulations.

CONCLUSION

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision and order, this decision and order will be entered.

ORDER

Respondent, City of Hope National Medical Center, shall comply with each and every provision of the Animal Welfare Act (7 U.S.C. § 2131 *et seq.*) and the standards and regulations issued thereunder

(9 CFR Parts 1, 2, and 3) and shall cease and desist from any violation thereof.

To assure that any research at the City of Hope National Medical Center subject to the Animal Welfare Act is conducted in accordance with the Act and regulations, respondent shall institute the following actions within 30 days after the effective date of the Order:

1. The director of any research project utilizing animals, as defined in the Act and regulations, must consult with a veterinarian:
 - (a) On the proper use of anesthetics and analgesics; and
 - (b) On the proper care of injured animals.

It is understood that such consultations are to assure that respondent establishes and maintains an adequate program of veterinary care and are not intended to interfere with the actual conduct of research.

2. Respondent shall establish an advisory committee for laboratory animal care, responsible to the Executive Medical Director, to oversee respondent's compliance with the regulations and standards issued under the Act.

(a) The committee shall include at least one member who is not affiliated with either animal research or the animal right movement.

(b) The committee's oversight shall include, but not be limited to, a review of the use of anesthesia, the degree of sanitation maintained in operating rooms, and the post-operative care given research animals.

(c) The committee shall make quarterly reports to the Executive Medical Director detailing its findings concerning respondent's compliance with the Act and the regulations and standards thereunder. Respondent shall send a copy of these reports to the Area Veterinarian in Charge, APHIS, 83 Scripps Drive, Sacramento, California 95825.

3. Respondent shall establish and maintain training programs to assure that all individuals involved in the care and handling of laboratory animals for research purposes are properly trained in the standards under the Act.

4. Respondent shall distribute a copy of this Decision and Order to all its personnel who are responsible for the care and handling of research animals subject to the Act. Respondent shall maintain an ongoing information program designed to insure that such personnel are aware of the provisions of this Decision and Order.

5. Respondent shall, within sixty days after service of this Decision and Order, send the Area Veterinarian in Charge a written

report setting forth the steps it has taken to implement the requirements of this Order.

Respondent is assessed a civil penalty of \$11,000 which shall be paid by a certified check or money order payable to the Treasurer of the United States.

This order shall have the same force and effect as if entered after a full hearing and shall become effective on the first day after service of this Decision and Order on the respondent.

In re: MYRA SAVAGE, AWA Docket No. 198. Decided January 31, 1986.

Donald Tracy, Mkt. Div. OGC, for complainant.
Gary Wiesel, Mt. Pleasant, Iowa, for respondent.

Decision by William J. Weber, Administrative Law Judge.

ORDER DISMISSING COMPLAINT

Complainant moves to dismiss the complaint without prejudice because the respondent has surrendered her license and complainant believes this accomplishes the purposes of the Act in this case.

It should be and hereby is ordered that the complaint is dismissed without prejudice.

In re: GENTLE JUNGLE, INC., AWA Docket No. 271. Decided February 10, 1986.

Numerous violations of the Animal Welfare Act.

The Judicial Officer affirmed Judge Palmer's order revoking respondent's license and assessing a civil penalty of \$15,000 for numerous violations of the Animal Welfare Act. Complainant need only prevail by a preponderance of the evidence. A corporation is responsible for the acts or failures of its employees or other persons acting for it. Question left open as to whether anesthetizing animals solely for the purpose of making the animals appear dead while exhibited, or dyeing the animals, is unlawful.

Donald Tracy, for complainant.
Respondent, pro se.

Decision by Donald Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*), and the regulations and stand-

ards issued thereunder (9 CFR § 1.1 *et seq.*). On March 6, 1985, Administrative Law Judge Victor W. Palmer (ALJ) issued an initial Decision and Order directing respondent to cease and desist from violating the Act and regulations, assessing a civil penalty of \$15,300, and revoking respondent's license issued under the Act.

On June 5, 1985, respondent appealed to the Judicial Officer, to whom final administrative authority has been delegated to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 (7 CFR § 2.35).^{*} Complainant filed a cross-appeal on July 11, 1985. The case was referred to the Judicial Officer for decision on September 24, 1985.

Based on a careful reading of the entire record in this case, the initial decision by the ALJ is adopted as the final decision in this case (with a few trivial changes). Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

PRELIMINARY STATEMENT

This is an administrative proceeding initiated by a complaint filed on October 17, 1983, by the Acting Administrator, Animal and Plant Health Inspection Service (APHIS), alleging that respondent, Gentle Jungle, Inc., violated the Animal Welfare Act (the Act), 7 U.S.C. §§ 2131-2155.¹ The complaint charges that respondent, as a

^{*} The position of Judicial Officer was established pursuant to the Act of April 1, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted* in 5 U.S.C. app. at 1088 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 2 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

¹ The provisions of the Animal Welfare Act pertinent herein are:

7 U.S.C. § 2132(c), (g) and (h), which defines the terms "commerce," "animal," and "exhibitor," so as to make respondent subject to the Act and to regulations issued under it by the Secretary of Agriculture.

7 U.S.C. § 2139 which establishes a broad and embracing standard of construction of principal-agent relationships to allow the Act to be enforced against an animal exhibitor for any act or omission by any person acting for it or in its employ.

7 U.S.C. § 2141 which requires that: "all animals delivered for transportation, transported, purchased, or sold, in commerce, by a dealer or exhibitor shall be marked or identified at such time and in such humane manner as the Secretary may prescribe"

7 U.S.C. § 2143a¹ which authorizes the Secretary to promulgate standards governing the humane handling, care, treatment and transportation of animals by dealers, research facilities and exhibitors consisting of minimum requirements for

Continued

licensed exhibitor of wild animals, repeatedly violated applicable standards under the Act for the care and handling of its animals, and failed to maintain records as required by applicable regulations. On November 23, 1983, an answer was filed by attorneys on respondent's behalf. On February 24, 1984, an amended complaint was filed alleging additional incidents of inadequate animal care and handling by respondent and additional recordkeeping violations found on reinspections of respondent's premises made subsequent to the filing of the original complaint. On March 22, 1984, an answer to the amended complaint was filed on respondent's behalf by its attorneys. Pursuant to a motion by complainant that the proceedings were ready for hearing, a notice scheduling an oral hearing in Los Angeles, California was issued on June 4, 1984. On July 27, 1984, respondent's attorneys notified the Hearing Clerk that they had withdrawn from its representation. On August 8, 1984, a notice was issued to respondent advising that it would be treated as representing itself *pro se*; the hearing would continue to be scheduled for November 6, 1984, and would not be postponed; and that if respondent wished to retain new counsel it should do so well enough in advance of the hearing that its attorneys would be prepared to go to hearing on November 6, 1984. A reminder notice of the November 6, 1984 hearing was issued on October 11, 1984.

On November 2, 1984, a telephone conference was held with complainant's counsel and Ralph Helfer, the President of the respondent corporation, in which Mr. Helfer advised that he would personally represent respondent at the hearing since there were no funds to pay attorneys. The rules of practice and various procedural questions raised by Mr. Helfer were discussed during the conference. Completed subpoenas for direct service by respondent, with instructions on how this was to be done, and a pamphlet copy of the rules of practice were mailed to respondent by Express Mail on November 2, 1984.

On November 6, 7, and 8, 1984, an oral hearing was held in Los Angeles, California. Complainant was represented by Donald A.

animal handling, housing, feeding, watering, sanitation, ventilation, shelter from extremes of weather and temperatures, and adequate veterinary care.

7 U.S.C. § 2145 which authorizes the Secretary, after notice and opportunity for hearing and after determining the Act has been violated, to revoke a license, assess a civil penalty of not more than \$1,000 for each violation, and to enter a cease and desist order. Each violation and each day during which a violation continues is specified to be a separate offense. The Secretary is directed to give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations.

Tracy, Office of the General Counsel, United States Department of Agriculture, Washington, D. C. Respondent was represented by its President, Ralph Helfer. At the close of the hearing, both parties were given time to file proposed findings, conclusions, and supporting briefs. Staggered briefing was scheduled wherein complainant was required to file first to provide respondent with an opportunity to review complainant's materials and determine what, if any, responsive written arguments it might wish to enter. Complainant filed its proposed findings, conclusions, and brief on January 10, 1985. Respondent did not file a response within the allotted time and has not sought to file any written arguments.

Upon consideration of the evidence of record and the arguments of the parties, it has been decided that respondent violated the Act and pertinent regulations. An order is being entered revoking respondent's Class C license as an animal exhibitor, directing it to cease and desist from future violations, and requiring it to pay civil penalties totalling \$15,300.00.

FINDINGS

A. General

1. Respondent, Gentle Jungle, Inc., 3815 West Olive Avenue, Suite 102, Burbank, California 91505, is a corporation which, at all times material herein, was an animal exhibitor and held a Class C license (No. 93 C-76) issued under the Act. Respondent is no longer engaged in business, but during the period 1980 through 1983, it was one of the largest suppliers of wild animals for exhibition in motion picture and television productions.

2. Ralph D. Helfer is the President of the respondent corporation.

3. At the time of respondent's license application, May 16, 1975, and each time the license was renewed, respondent received a copy of the regulations and standards contained in Title 9, Chapter 1, Subchapter A of the Code of Federal Regulations, and agreed in writing to comply with them.

B. Prior Warning

4. On November 24, 1981, Dr. James H. Roswurm, the APHIS area Veterinarian in Charge, sent a letter to respondent respecting its violation of regulations found in the course of an inspection of its facilities which warned that future violations would be prosecuted.

C. Recordkeeping and Untagged Cats

5. On September 23, October 14, and October 25, 1982, APHIS personnel inspected respondent's facilities and found: (1) the actual inventory of exotic animals differed from that shown in respond-

ent's records; (2) no records to account for the disposition of some animals; and (3) a set of records was not maintained at the site where the animals were housed.

6. On November 29 and December 6, 1983, APHIS personnel inspected respondent's facilities and found untagged domestic cats to be present.

D. Veterinary Care for an Orangutan

7. In the summer of 1980, an orangutan owned by respondent was taken away from the set during the location filming of "Any Which Way You Can" and was struck with a cane and an axe handle by respondent's head trainer to make it more responsive to his commands and more submissive during the filming. Immediately afterwards, the orangutan exhibited a very submissive manner but there were no physical signs of injury. The orangutan was not provided veterinary care after the incident until it died a month later from acute cardiac collapse resulting from undetermined causes. During the month that followed the incident, the orangutan was not observed to be injured, sick or otherwise in need of veterinary care. To the contrary, on one occasion, it had the strength to seize one of the respondent's other trainers who had come too near its cage and held the trainer in a powerful grip until its attention was diverted.

E. Handling and Veterinary Care Provided a Sick Tiger

8. On November 20, 1981, respondent had its tiger, "Sulton" dyed black for exhibition as a panther in a film. The tiger was dyed by a veterinarian who first administered the drug Sernalin, a phenocycline, or PCP, to knock the tiger down; and anesthetized it with Halothene gas. The tiger was then dipped in a solution of Clairol professional hair dye. Three other tigers owned by respondent were likewise dyed by the veterinarian and tolerated the procedure without incident. Sulton did not and died on November 30, 1981, from an apparent adverse reaction to the drug Sernalin. The tiger never fully came out of its anesthetized state. The treating veterinarian was in attendance from the time he dyed the tiger until the next day when it was moved to respondent's ranch at Colton, California, in response to directions from local Animal Control authorities. The veterinarian accompanied the tiger to the Colton ranch, set up procedures for its care, and placed it in a trailer with hay and heat lamps. The veterinarian returned to examine it two days later when he concluded its condition was stable and improving. The treating veterinarian did not attend the tiger again until its death on November 30, 1981. There is a conflict in the evidence as to the content of telephone communications respondent's employees had

with the veterinarian prior to the tiger's death. In any event, the tiger's condition progressively deteriorated from November 26, 1981, until its death on November 30, 1981.

(a) During the four-day period of November 26 and November 30, 1981, the tiger did not receive personal veterinary care to better address its health problems and to ameliorate its suffering.

(b) The tiger, on November 28 or 29, 1981, while very sick and unable to walk, was dragged from where it was housed by respondent's employees who used its tail to pull it, causing abrasions to the tiger's skin and increasing its suffering.

F. Failure to Provide Veterinary Care to a Sick Leopard

9. In January 1982, respondent's leopard, Satan, became sick and was not provided veterinary care from the time it was first observed to be sick (lethargic, refused food, just lay there), until its death nearly two weeks later. Veterinarians were called by respondent, but all but one refused to come because respondent already owed them overdue bills. The one who agreed to see the leopard required an experienced trainer to be in attendance and, again, all but one trainer refused to attend the leopard because they were unpaid for prior services. Respondent failed to coordinate the presence of the one willing trainer with the one willing veterinarian and the leopard died unattended and untreated.

G. The Anesthetizing of a Ferret

10. During the summer of 1980, a trainer employed by respondent used a non-medical grade of ether to anesthetize a ferret for exhibition in a film.

H. Housing a Bear in an Unclean Cage Without Drinking Water

11. In the spring of 1982, a full grown black bear owned by respondent was observed by one of respondent's former employees to have been confined in a cage that was not kept clean and was without drinking water.

I. Failure to Adequately Feed "Large Cats"

12. During mid-1980 through mid-1981, respondent was often without funds or acceptable credit to purchase needed food for the large cats (lions, tigers, etc.) it kept at the Colton facility. Respondent, as a consequence, provided no food to the large cats on a number of days when they were not scheduled to fast for health reasons or training purposes, and on various other days, fed the large cats only one chicken each instead of their normal food ration of three to four chickens each. During this period, the large cats were only rarely fed other types of food needed for a healthy diet.

J. Outdoor Housing of Camels, Llamas and Lions

13. On November 29, 1983, and again on December 6, 1983, an Animal Health Technician employed by APHIS inspected respondent's facilities at the Cougar Hill Ranch, Littlerock, California. She ordered respondent to correct deficiencies found at the time of the first inspection, but when she reinspected the facility, one week later, the following deficiencies were still in existence:

(a) Respondent's camels and llamas were confined outdoors by an open wire enclosure which provided them with no protection from the elements.

(b) Several of respondent's lions were housed outdoors in chain-link cages which did not contain den boxes needed for their protection from the elements.

K. Handling, Sanitation, Feeding, Watering, and Housing of Three Elephants

14. On November 29, 1983 and December 6, 1983, when the APHIS Animal Health Technician inspected respondent's facilities at the Cougar Hill Ranch, Littlerock, California, she also found that respondent was housing its three elephants in a trailer that was too small for normal movements by the elephants, and the inside walls of which had splintered plywood and protruding bolts endangering the elephants. At the time of her first inspection, the APHIS Health Technician ordered the correction of these conditions, but when she reinspected the facility, one week later, they existed as before.

15. In addition to the observations by the APHIS official on November 29 and December 6, 1983, the elephants were observed another time in December 1983 by another APHIS official accompanied by two elephant experts. On a subsequent day in December 1983, probably the 20th, they were observed by a third expert when he purchased and took possession of one of the elephants. Each time they were observed, the elephants were found to be chained inside a trailer where they were unable to move about sufficiently; the elephant chained between the wheel wells could not lie down; there was excessive accumulation of manure on the trailer floor which was wet and spongy from urine, indicating to the experts that the trailer had not been cleaned daily; and the elephants appeared to be thin, underfed, and in discomfort.

16. On December 20, 1983, approximately, Mr. Gary Johnson purchased and took possession of one of the elephants which he believed to be in the best condition of the three. Mr. Johnson found that elephant to be thin and apparently underfed, and its feet

needed special care because of an excessive buildup of dead tissue, which resulted from a lack of sufficient exercise.

CONCLUSIONS

1. Respondent, at all times material herein, was and is subject to the jurisdiction of the Secretary of Agriculture as the holder of a Class C license issued to respondent as an animal exhibitor under the Act.

2. Respondent, on September 23, October 14, and October 25, 1982, violated regulations issued by the Secretary (9 CFR §§ 2.275 and 2.125) respecting the business records it was required to maintain as a Class C licensee. Additionally, on November 29 and December 6, 1982, untagged domestic cats were on respondent's business premises in violation of 9 CFR § 2.50. A civil penalty of \$800.00 is appropriate.

Respondent's recordkeeping violations arose out of its failure to keep a set of records at the facility where its animals were housed (9 CFR § 2.125), and its failure to maintain records in the prescribed form showing the details of all acquisitions and dispositions of animals in its possession at various times (9 CFR § 2.75).

Respondent was required by 9 CFR § 2.125 to furnish requested information to any Veterinary Service representative "within such reasonable time as may be specified in the request." Because respondent did not keep a set of books at the facility where it kept its animals, it was unable to promptly comply with such requests on three occasions. This is construed to be a violation of the regulation but was the result of respondent's misunderstanding of APHIS requirements and was not in furtherance of any scheme to circumvent the Act. A penalty of \$100.00 for each of the three instances of this violation, or \$300.00 total, is appropriate.

Primarily, to guard pet dogs and cats from thieves who would steal and later sell them for laboratory experimentation, APHIS imposes stringent recordkeeping requirements to document the ownership history of animals in the possession of dealers and other licensees. APHIS also requires dealers and exhibitors to affix collars with special identification tags to all dogs and cats in their possession. Harsh sanctions for violations of these recordkeeping and tagging requirements are typically imposed as necessary to the achievement of this laudable goal. See *Rudolph Vrana*, — Agric. Dec. —, (Nov. 6, 1984). However, the dogs and cats on respondent's premises were either pets owned by its employees and students, or highly trained animal performers. Respondent's business is not the type that is used to launder the identity of stolen dogs and cats. Furthermore, the inaccuracies in respondent's records

chiefly concerned discrepancies in its inventory of exotic animals which apparently resulted from inadvertent bookkeeping errors of omission. Respondent's recordkeeping violations of 9 CFR § 2.75 are not concluded to be egregious in nature and a civil penalty of \$300.00 is appropriate.

For these same reasons, complainant's violations of 9 CFR § 2.50, due to the presence of untagged domestic cats on its premises at the time of inspections by an APHIS official on November 29 and December 6, 1983, must also be construed to be minor in nature and, again, a civil penalty of \$100.00 for each of the two violations, or \$200.00 total, appears to be sufficient and appropriate.

3. *There is no record evidence showing respondent's orangutan was "sick, diseased, injured, lame or blind" needing veterinary care after it was repeatedly struck by its trainer, in the summer of 1980; and therefore the one applicable regulation, 9 CFR § 3.84, was not violated.*

Departmental regulations applicable to nonhuman primates do not presently require their humane handling and treatment. This is a grievous oversight—an oversight that should be immediately corrected by concerned officials.

The only regulation now applicable to orangutans and other "nonhuman primates" has very limited application. It requires veterinary care to be provided to those animals observed to be "sick, diseased, injured, lame or blind." The testimony in this proceeding is that after being repeatedly struck, the orangutan exhibited a subdued manner for a time, but there were no physical signs or evidence of injury. Furthermore, its health was sufficiently vigorous to enable it to later seize and threaten one of its trainers.

The cause of its death a month later is undetermined, and to speculate that it was related to the beating, or that veterinary care could have prevented it, would be merely that—speculation.

4. *Respondent, on November 26, 27, 28, and 29, 1981, violated 9 CFR § 3.134 by failing to provide veterinary care to its sick tiger, Sulton.*

5. *Respondent, on November 28 or 29, 1981, violated 9 CFR § 3.135 when its employees mishandled respondent's sick tiger, Sulton, dragging it by the tail to move it from where it was housed, and caused it unnecessary discomfort and stress.*

6. *The maximum civil penalty of \$1,000.00 for each of the respondent's five violations concerning its tiger, Sulton, or \$5,000.00 total, is appropriate.*

At the hearing, Mr. Helfer questioned whether the failure to provide the tiger veterinary care for four days after its condition started to degenerate on November 26, 1981, is properly attributable to

respondent or should be instead considered to be a breach of duty by the treating veterinarian employed by respondent as an independent contractor. The Act renders this consideration academic in that a licensee is held directly responsible "for any act or omission by any person acting for it or in its employ" (7 U.S.C. § 2139). In short, the Act precludes a licensee from delegating away its responsibility to provide each of its animals humane treatment and needed veterinary care. Various of respondent's employees testified that they observed the tiger to be suffering and in need of veterinary care and treatment from November 26, 1981, until its death. Their observations established respondent's duty to secure the needed veterinary care. When it was finally provided on November 30, 1981, it came too late and the tiger had suffered needlessly for four days.

During those four days of suffering, some of respondent's employees cruelly added to the tiger's torment by dragging the animal across the ground to move it from the trailer where it was housed. This incident, when added to the four days when it should have been provided needed veterinary care, constitutes a fifth violation of the Act which, together with the other four, should be penalized at the statutory maximum amount.

7. Respondent, in January 1982, violated 9 CFR § 3.134 by failing to provide veterinary care to its sick leopard, Satan, for over one week. A civil penalty of \$3,000.00 is appropriate.

There is less testimony in the record pertaining to the leopard, Satan, and its need for veterinary care than was given respecting the tiger, Sulton. Its physical suffering, apparently, was not as intense. For that reason, a lesser civil penalty of \$3,000.00 is being assessed.

On respondent's behalf, it is to be noted that attempts were made to obtain veterinary care which came of nothing because of its poor financial circumstances. But those who would employ animals for profit, particularly the large profits realized when they are exhibited for films, must first assure that they are always able to faithfully and promptly attend to the medical and other needs of these dependent animals.

The Department of Agriculture's sanction policy is to deal harshly with those who, because they are undercapitalized, are unable to fully discharge their financial duties to growers and dealers in agricultural commodities. See *Worsley*, 33 Agric. Dec. 1547, 1556-71 (1974). It is appropriate that this same standard be made applicable to licensed animal exhibitors to assume their faithful discharge of the duties they owe the animals they use for profit.

8. Respondent, during the summer of 1980, violated 9 CFR § 3.135 when its trainer anesthetized a ferret with a non-medical grade of ether and caused it unnecessary behavioral stress. A civil penalty of \$500.00 is appropriate.

A veterinarian who respondent employed on various occasions to assist it in exhibiting its animals, testified that the preferred procedure for anesthetizing a ferret for exhibition in a film scene is to have a veterinarian put it to rest with halogen gas. In his opinion, the procedure employed by respondent's trainer was unnecessarily stressful to the animal.

Although the practice of anesthetizing healthy animals for special film illusions has not been questioned in this proceeding, the procedure employed should, at very least, be performed by a competent veterinarian using the finest grade of anesthetics.

Inasmuch as there was no proof that the animal suffered any permanent harm, the civil penalty is being assessed at one-half of the maximum amount.

9. Respondent, in the spring of 1982, violated 9 CFR § 3.137(d) by failing to provide a bear a clean and sanitized cage, and violated 9 CFR § 3.130 by failing to provide the bear adequate drinking water. A civil penalty of \$500.00 is appropriate.

Although violations of two regulations were observed by one of respondent's employees, they both involved a single instance of neglect. A total civil penalty of \$500.00 appears to be appropriate.

10. Respondent, from the middle of 1980 through the middle of 1981, violated 9 CFR § 3.129 by failing to feed its large cats (lions and tigers, etc.) food of sufficient quantity and nutritive value to maintain all animals in good health. A civil penalty of \$2,000.00 is appropriate.

Credible testimony makes it very clear that during mid-1980 through mid-1981, respondent's lack of working capital and its poor credit rating, caused it to provide food of insufficient quantity and nutritive value to its lions, tigers and other large cats. What the record evidence leaves uncertain is the number of days when these violations were committed. Inasmuch as the principal witness on this subject recalled times when the cats were in need of food and were only given one chicken each, and others when they were fed nothing, the record does support the imposition of a maximum civil penalty for each of the two types of food deprivation, each of which must have occurred at least once.

11. Respondent, on November 29, 1983 and December 6, 1983, violated 9 CFR § 3.127 by failing to provide llamas, camels, and lions with sufficient shelter from cold, sunlight, and inclement weather. A civil penalty of \$500.00 is appropriate.

These violations were detected after respondent moved its animals to a new facility and before it had completed permanent arrangements for their housing. Although such violations are serious in nature, none of the animals were noted to have suffered any adverse consequences, and a total civil penalty of \$500.00 therefore seems appropriate.

12. Respondent, on November 29, 1983, and December 6, 1983, violated 9 CFR § 3.128 by housing three elephants in a trailer that did not provide sufficient space to allow each animal to make normal postural movements.

13. Respondent, on November 29, 1983, and December 6, 1983, violated 9 CFR § 3.125(a) by housing three elephants in a trailer, the inside walls of which were not maintained in good repair to protect the animals from injury.

14. Respondent, on two other days in December 1983, violated § CFR § 3.129, in that its three elephants were observed to be underfed; and violated 9 CFR § 3.131 in that the trailer in which the elephants were enclosed was not adequately cleaned of their excreta.

15. A civil penalty of \$3,000.00 for these violations is appropriate. Again, respondent's violations are the outgrowth of its poor financial condition at the time which led it to house its elephants in a trailer that was not suitable for longterm confinement, to cut back on their food rations, and to have a staff which was inadequate for the elephants' proper care.

The appropriate overall penalty for these violations, involving three elephants, appears to be \$3,000.00.

16. In addition to the civil penalties that are being assessed, respondent's license should be revoked.

Respondent committed so many serious violations of the APHIS standards designed to protect the health and well-being of the animals it used for exhibition, its license as an exhibitor necessarily needs to be revoked.

In sum, upon consideration of the large and once extremely profitable business respondent conducted as an animal exhibitor, the gravity of specific violations found to have been committed, and the overall pattern of recurrent violations over a period of several years, a civil penalty totalling \$15,800.00 is being assessed and respondent's license shall be revoked to preclude future violations.

Accordingly, the following order shall be entered.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent's appeal, in the main, reargues matters that were fully considered by the ALJ and correctly decided. No useful purpose would be served by a detailed discussion of these matters. In

short, the record contains ample evidence to support the ALJ's findings,² and the record reveals no procedural irregularities.

Respondent's owner argues that the respondent corporation should not be responsible for the actions or failures of employees or other persons acting for the corporation, but the Act expressly makes an exhibitor responsible for the acts or omissions of employees or other persons acting for the exhibitor. Specifically, the Act provides (7 U.S.C. § 2139):

§ 2139. *Principal-agent relationship established*

When construing or enforcing the provisions of this chapter, the act, omission, or failure of any person acting for or employed by a research facility, a dealer, or an exhibitor . . . within the scope of his employment or office, shall be deemed the act, omission, or failure of such research facility, dealer, exhibitor, licensee, operator of an auction sale, intermediate handler, or carrier, as well as of such person.

Respondent's owner argues that its license should not be revoked "in perpetuity" (Appeal at 3). But the regulations provide that a person whose license has been revoked is eligible to apply for a new license after 1 year from the effective date of the revocation (9 CFR § 2.10).

Complainant seeks to increase the civil penalty by \$3,000 because of the violations involving the three elephants, but the civil penalty assessed against respondent, in conjunction with the revocation order, is adequate to serve as an effective deterrent to future violations.

Complainant argues on appeal that the ALJ improperly dismissed the allegation relating to respondent's orangutan. But the record supports the ALJ's finding that there were no physical signs or evidence of injury to the animal requiring veterinary care. Accordingly, the ALJ properly dismissed the allegation in the complaint as to the orangutan. The ALJ correctly observed that the failure of the Department's regulations to require humane handling and treatment of nonhuman primates, in the circumstances of this case, "is a grievous oversight—an oversight that should be

² Complainant need only prevail by a preponderance of the evidence. See *Herman & MacLennan v. Huddleston*, 450 U.S. 375, 387-82 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981); *In re Rowland*, 40 Agric. Dec. 1934, 1941 n.5 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Cold Bell-J&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1345 (1978), *aff'd*, No. 78-8134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980).

immediately corrected by concerned officials" (Initial Decision at 16).

I should note that nothing in this decision should be regarded as affirming the legality of anesthetizing an animal solely for the purpose of (i) making the animal appear dead while exhibited, or (ii) dyeing the animal a different color. The record in this case indicates that anesthetization, even when done "properly" by a veterinarian, is stressful. Whether anesthetization solely for the purpose of exhibiting an animal causes "unnecessary discomfort, behavioral stress, or physical harm to the animal" is a question that is not involved here and will be left open.

For the foregoing reasons, the following order should be issued.

ORDER

1. Respondent's license is hereby revoked.
2. Respondent is assessed a civil penalty of \$15,300, which shall be paid not later than the 90th day after service of this order by certified check or money order, made payable to the United States Treasury and sent to Donald A. Tracy, United States Department of Agriculture, Office of the General Counsel, Room 2014-South Building, Washington, D.C. 20250.
3. Respondent and its officers, employees, agents and assigns, acting directly or indirectly, or through any corporation, trust or other device whatsoever, is ordered to comply with the Act and all the regulations and standards thereunder and to cease and desist from any violations thereof.

The cease and desist provisions of this order shall become effective on the day after service of this order on respondent. The revocation order shall become effective on the 30th day after service of this order on respondent.

In re: LARRY D. LITTLE, AWA Docket No. 309, Decided February 20, 1986.

Violation of Animal Welfare Act.

*Robert A. Ertman, for complainant,
Respondent, pro se.*

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*) ("Act") by a Complaint filed by

the Administrator, Animal and Plant Health Inspection Service ("APHIS"), United States Department of Agriculture, charging that respondent violated the regulations and standards issued under the Act (9 CFR § 1.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to these proceedings (7 CFR § 1.138).

The respondent admits the jurisdictional allegations contained in the complaint, specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, and waives oral hearing and further procedure. Complainant and respondent agree for the purpose of settling this procedure to the entry of this decision.

FINDINGS OF FACT

1. Respondent is an individual whose mailing address is Box 186, Barnes City, Iowa 50027.

2. At all times material herein respondent was licensed as a dealer under the Act.

3. At the time of his original license application, respondent received a copy of the regulations and standards contained in 9 CFR Chapter I, Subchapter A, and agreed in writing to comply with said standards and regulations.

CONCLUSION

Respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision and order, this decision and order will be entered.

ORDER

Respondent shall comply with each and every provision of the Animal Welfare Act (7 U.S.C. § 2131 *et seq.*) and the standards and regulations issued thereunder (9 CFR § 1.1 *et seq.*) and shall cease and desist from any violation thereof.

This order shall have the same force and effect as if entered after full hearing and shall become effective on the first day after service of this Decision and Order on the respondent.

In re: CAROLYN MABERRY. AWA Docket No. 338. Decided February 20, 1986.

Violation of the Animal Welfare Act.

Robert Ertnas, for complainant.

James J. Wheeler, for respondent.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Animal Welfare Act, as amended, 7 U.S.C. § 2131 *et seq.*, by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent violated the regulations and standards issued pursuant to the Act, 7 CFR § 1.1 *et seq.* This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding, 7 CFR § 1.138.

The respondent admits the jurisdictional allegations in of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Carolyn Maberry, hereinafter referred to as respondent, is an individual whose mailing address is Route 2, Dawn, MO 64638.

2. At all times material herein respondent was licensed under the Act as a Class B dealer.

3. At the time respondent's license was issued and annually thereafter, respondent received a copy of the regulations and standards contained in Title 9, Chapter 1, Subchapter A of the Code of Federal Regulations and agreed to comply with said regulations and standards.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent shall abide by each and every provision of the Animal Welfare Act, as amended, and the regulations and stand-

ards issued thereunder, and shall cease and desist from violations thereof. Further, respondent is assessed a civil penalty of \$500.00, which is hereby suspended conditioned upon her compliance with this order.

The provisions of this order shall become effective on the first day after service of this decision on the respondent.

Copies of this decision shall be served upon the parties.

In re: CARNIVORE EVOLUTIONARY RESEARCH INSTITUTE, AWA Docket No. 251. Decided February 24, 1986.

Violation of Animal Welfare Act.

Donald Tracy, for complainant.

Kim Wetherill, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Animal Welfare Act, as amended, 7 U.S.C. § 2131 *et seq.*, by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent violated the regulations and standards issued pursuant to the Act, 9 CFR § 1.1 *et seq.* This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding, 7 CFR § 1.138.

The respondent admits that at times material to the allegations of the complaint it was registered as a research facility under the Act and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

(1) Respondent, Carnivore Evolutionary Research Institute, the predecessor to Carnivore Preservation Trust, has a mailing address of Route 5, Box 326, Pittsboro, North Carolina 27312.

(2) Respondent, at times material herein, was registered as a research facility under the Act.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such a decision will be entered.

ORDER

(1) Respondent, its agents and employees, acting directly or indirectly through any corporate or other device shall not violate the Animal Welfare Act and the regulations and standards issued thereunder in particular:

a. Agrees to obtain a license before selling animals covered by the Act; and

b. Agrees not to interfere with inspections conducted by APHIS pursuant to the Act during normal business hours.

(2) Respondent is assessed a civil penalty of \$2250.

The provisions of this order shall become effective on the day after service of this decision on the respondent.

Copies of this decision shall be served upon the parties.

In re: L.M. and WANDA BARNFIELD. AWA Docket No. 352. Decided February 28, 1986.

Violation of the Animal Welfare Act.

Robert Ertson, for complainant.

Harvey M. Teitelbaum, for respondent.

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION AND ORDER

This is a proceeding under the Animal Welfare Act. A complaint was issued by the Administrator of the Animal and Plant Health Inspection Service pursuant to the Act and the applicable Rules of Practice. The complaint was served upon respondents. This decision is entered pursuant to the consent decision provision of the Rules of Practice (CFR § 1.138).

For the purpose of settling this case and for such purpose only, respondents admit the jurisdictional allegations of the complaint, specifically admit that the Secretary of Agriculture has jurisdiction in this matter, and waive hearing and further procedure hereunder. Complainant and respondents consent to the issuance of this Order.

ORDER

Respondents, their agents and employees, acting directly or through any other person, agent, corporation or other entity, shall cease and desist from violating the Animal Welfare Act and the regulations and standards issued thereunder, and in particular, from selling animals without a license as required by the Act.

In accordance with section 19 of the Act (7 U.S.C. § 2149), respondents are assessed a civil penalty in the amount of \$15,000.00.

From the effective date of this order, respondents shall not, directly or through any other person, agent, corporation or other entity, engage in, be associated with, or derive any benefit from, any business or activity requiring a license under the Animal Welfare Act, except with the prior written approval of the Area Veterinarian-in-Charge, United States Department of Agriculture. This provision shall not bar the sale or lease of property, real or personal, nor the sale of any business entity, so long as the amount of compensation of such sale or lease does not depend in whole or part upon income to be derived from activities subject to the Act; *Provided*, however, that notwithstanding this prohibition, respondent Wanda Barnfield may apply for a license as a Class "A" dealer after one (1) year from the effective date of this Order, and any such application shall be considered without regard for any incident which gave rise to the complaint in this action.

This order shall have the same effect as if entered after a full hearing and shall be effective upon service upon respondents.

Copies of this decision shall be served upon respondents.

COURT DECISION

UTICA PACKING COMPANY and DAVID FENSTER v. JOHN R. BLOCK
SECRETARY, UNITED STATES DEPARTMENT OF AGRICULTURE, et al
Civil Action No. 85-1324. (USDA FMIA Docket No. 35.) Decided
January 13, 1986.

James L. Quarles, III, Washington, D.C., and Geoffrey S. Stewart, for plaintiffs-appellants.

L. Michael Wicks, Assistant U.S. Attorney, Detroit, Michigan, for defendants-appellees.

UNITED STATES COURT OF APPEALS, SIXTH CIRCUIT.

Before LIVELY, Chief Judge, and CONTIE and WELLFORD, Circuit Judges. LIVELY, Chief Judge.

The question in this case is whether the Secretary of Agriculture may replace the Judicial Officer of the Department of Agriculture (hereafter USDA) after that officer has rendered a final decision in a case and then present a petition for reconsideration to the placement. The district court found no legal impediment to the course of conduct, and affirmed the decision rendered by the same Judicial Officer. We disagree and reverse.

THE ADMINISTRATIVE SETTING

In 1940 Congress passed the Schwellenbach Act, 54 Stat. (1940), now codified as 7 U.S.C. § 450c-450g (1982). This law authorized the Secretary of Agriculture (Secretary) to delegate his regulatory functions. Pursuant to this authority the Secretary established the position of Judicial Officer. "The Judicial Officer acts as the final deciding officer in lieu of the Secretary in Department administrative proceedings involving adjudicating or rate-making when the statute requires an administrative hearing or opportunity therefor." T. Flavin, *The Functions of the Judicial Officer, United States Department of Agriculture*, 26 Geo. Wash.L.Rev. 277 (1958) (footnote omitted). The delegation to the Judicial Officer as final deciding officer in adjudication proceedings is contained in CFR § 2.35 (1985).

The Federal Meat Inspection Act, 21 U.S.C. §§ 601, et seq. (1985) requires that all meat food products moving in or affecting commerce be "prepared," labeled and marked only as permitted by the statute and regulations and that inspectors be appointed for the purpose of enforcing these requirements. Section 401 of the Meat Inspection Act, 21 U.S.C. § 671, empowers the Secretary to remove a person or firm deemed unfit to deal with meat food products by withdrawing the inspection service:

The Secretary may (for such period, or indefinitely, as he deems necessary to effectuate the purposes of this chapter) refuse to provide, or withdraw, inspection service under subchapter I of this chapter with respect to any establishment if he determines, after opportunity for a hearing is accorded to the applicant for, or recipient of, such service, that such applicant or recipient is unfit to engage in any business requiring inspection under subchapter I because the applicant or recipient, or anyone responsibly connected with the applicant or recipient, has been convicted, in any Federal or State court, of (1) any felony, or (2) more than one violation of any law, other than a felony, based upon the acquiring, handling, or distributing of unwholesome, mislabeled, or deceptively packaged food or upon fraud in connection with transactions in food. This section shall not affect in any way other provisions of this chapter for withdrawal of inspection services under subchapter I from establishments failing to maintain sanitary conditions or to destroy condemned carcasses, parts, meat or meat food products.

For the purpose of this section a person shall be deemed to be responsibly connected with the business if he was a partner, officer, director, holder, or owner of 10 per centum or more of its voting stock or employee in a managerial or executive capacity.

The determination and order of the Secretary with respect thereto under this section shall be final and conclusive unless the affected applicant for, or recipient of, inspection service files application for judicial review within thirty days after the effective date of such order in the appropriate court as provided in section 674 of this title. Judicial review of any such order shall be upon the record upon which the determination and order are based.

The Secretary has promulgated rules of practice governing formal adjudicatory proceedings under various statutes, including the Meat Inspection Act, 7 CFR § 1.130, et seq. (1985). When an administrator of an agency within the USDA files a complaint with the Secretary the matter is referred to an administrative law judge (ALJ). Upon request the party complained against is entitled to a hearing before the ALJ. The decision of the ALJ is final unless there is a timely appeal to the Judicial Officer, who decides the appeal on the administrative record. The Judicial Officer may accept oral argument or accept submission on briefs. The Judicial

Officer renders a decision under procedures set forth in 7 CFR § 1.146(i):

(i) Decision of the Judicial Officer on Appeal. As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

The regulations further provide that if reconsideration is sought a petition to reconsider the decision of the Judicial Officer shall be filed within 10 days after service of the decision. 7 CFR § 1.146(a)(3).

I.

A.

In 1978 David Fenster, president and part owner of Utica Packing Company was convicted of bribing a meat inspector. After a hearing on a complaint filed by USDA the ALJ ordered withdrawal of meat inspection services from Utica unless Fenster divested himself of his holdings in the company and withdrew from management. Fenster appealed the decision and the Judicial Officer, Donald Campbell, affirmed the finding of the ALJ that Utica was unfit to receive inspection services because a responsibly connected person had been convicted of a felony which went to the heart of the inspection program. The Judicial Officer found Fenster's argument for leniency based on mitigating circumstances irrelevant and declined to consider any other circumstances in view of the type of felony involved. The effect of withdrawing inspection was to debar Utica from engaging in the meat products business so long as Fenster was associated with the company.

Fenster and Utica filed a complaint in the United States District Court for the Eastern District of Michigan pursuant to 21 U.S.C. § 674,¹ seeking review of the final decision of the Judicial Officer. After reviewing the administrative record the district court granted summary judgment affirming the decision. *Utica Packing Co. v. Bergland*, 511 F.Supp. 655 (E.D. Mich. 1981). On appeal this court found that the Judicial Officer erred in refusing to consider mitigating circumstances. The case was remanded "to afford the Judicial Officer an opportunity to consider the mitigating circumstances advanced by Fenster." *Utica Packing Co. v. Bergland*, 705 F.2d 460 (6th Cir. 1982) (Table).

Upon remand Judicial Officer Campbell expressed strong disagreement with the decision of this court, stating "any person who is convicted under 18 U.S.C. § 201(b) of corruptly bribing a Federal meat inspector is unfit to receive Federal inspection regardless of any mitigating circumstances." *In re Utica Packing Company*, FMA Docket No. 35, Decision at 27 (Nov. 18, 1982) (emphasis in original). Because he was required to do so by this court's decision, Campbell did review the evidence of mitigating circumstances which included: possible improper conduct by the inspectors; virulent anti-Semitic remarks by one of the inspectors (Fenster is a Jewish survivor of the Holocaust); Fenster's serious health problems at the time of the bribery; evidence that despite the bribery, Fenster wanted to operate a clean plant; and the Judicial Officer's finding that the bribery stemmed partly from a misunderstanding.

As he reviewed each of the mitigating circumstances Judicial Officer Campbell stated in his decision that, except for this court's decision, he would "give no weight to this circumstance." Nevertheless, Campbell concluded:

If mitigating circumstances must be considered, I cannot reasonably imagine any stronger mitigating circumstances than appear here. If any felon convicted under 18 U.S.C. § 201(b) of bribing a meat inspector is fit to receive Federal meat inspection, then David Fenster is fit . . . *Id.* at 28.

¹ 1. 21 U.S.C. § 674 provides:

The United States district courts, the District Court of Guam, the District Court of the Virgin Islands, the highest court of American Samoa, and the United States courts of the other Territories, are vested with jurisdiction specifically to enforce, and to prevent and restrain violations of, this chapter, and shall have jurisdiction in all other kinds of cases arising under this chapter, except as provided in section 607(e) of this title.

The Judicial Officer ordered the complaint dismissed "with great reluctance and misgiving." *Id.* at 29.

B.

Since the Judicial Officer acts for the Secretary, the only post-decision proceeding open to the USDA is a petition to the Judicial Officer for reconsideration. Several USDA officials met shortly after receiving Campbell's second opinion to consider what options might be available. As the brief of the Secretary in this court states, the USDA "violently disagreed" with the latest decision of the Judicial Officer and had "little hope of reconsideration." Instead of petitioning for reconsideration immediately, these officials obtained the Secretary's agreement to revoke Campbell's authority to perform any further "regulatory function" in the Utica case and to "vest such authority in Deputy Assistant Secretary John J. Franke, Jr." Appellee's Brief at 8-9. Mr. Franke is not a lawyer and had never performed adjudicatory, regulatory or legal work. Richard Davis, an attorney in the Office of General Counsel of USDA, was assigned to assist Franke. Davis had no previous contact with the Utica case, but his immediate supervisor participated in the removal of Campbell and appointment of Franke, and also supervised the division responsible for the prosecution of Utica.

Late in the afternoon of the tenth day after Campbell's decision the Secretary filed a petition for reconsideration with Franke. After denying Utica's motion to strike the notice of revocation and redelegation the new Judicial Officer granted the motion for reconsideration. Franke found that "despite the mitigating circumstances presented by respondent, respondent is unfit to receive federal meat inspection so long as David Fenster is associated with the plant." He then ordered inspection service withdrawn indefinitely until Fenster should sever all association with Utica. Utica and Fenster again sought review in the district court, and the district court again granted summary judgment in favor of the Secretary. This appeal followed.

II.

A.

There are additional facts that should be stated before we undertake a consideration of the legal issues raised by the parties. The USDA officials who made the decision to replace Campbell were Dr. Houston, Administrator of Food Safety and Inspection Services, the client agency of the prosecution; James Barnes, USDA General Counsel; James Kelly, an Associate General Counsel who actually

participated in supervision of the Utica case at the time the revocation and redelegation took place and was the supervisor of Richard Davis; and Harold Reuben of the Office of General Counsel who also participated in supervision of the prosecution. The Secretary was out of Washington and did not have information available to make an independent decision. He accepted the recommendation of the others and signed the revocation and redelegation order.

In response to requests for admission the Secretary judicially admitted that "[o]ne of the purposes of appointing a 'second Judicial Officer' was to improve the Department's chances of winning a petition for reconsideration."

B.

Utica and Fenster have presented a number of arguments for reversal, two of which require our consideration. In the first place, they contend that the actions of USDA violated the Administrative Procedure Act, particularly 5 U.S.C. § 554(d), which provides in relevant part:

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings.

The plaintiffs admit that Franke performed no investigative or prosecuting functions in the Utica case. They argue, however, that the selection of Franke and Davis by officials who were involved in the prosecution of the case violated the prohibition against prosecutors participating or advising in the decision of the second Judicial Officer. The Secretary counters that there was no violation of § 554(d) since neither Franks nor Davis had prior contact with the Utica case and no prosecutor or investigator participated as a judge.

The second basis for reversal urged by the plaintiffs is that the procedures followed by USDA in this case violated the due process guarantee of the Fifth Amendment. They assert that fundamental fairness was sacrificed to gain a desired decision from a hand-picked judge and that all appearance of fairness was "shattered." The plaintiffs point out that Campbell was a career employee who was protected under the merit system and thus immune to departmental pressures (though he had no tenure in the position of Judicial Officer), whereas Franks, a political appointee, had no job protection and could be fired at will. In addition, they contend, the ap-

pointment of Davis, a subordinate of Kelly, guaranteed that the group who chose the "option" of revocation and redelegation would have strong influence over the decision on reconsideration.

The Secretary responds that there is a presumption of honesty and integrity on the part of responsible officers and that the plaintiffs produced no evidence of any improprieties by Franke or Davis. He argues that the supervision of agency adjudicators by prosecutorial officers has been upheld and that criminal cases involving blending of prosecutorial and judicial functions are not controlling in administrative settings.

III.

A.

Neither the court nor the parties have found a case with facts similar to those established by this record. This may be because very few federal agencies and departments have a position like the USDA Judicial Officer. He acts as delegate of the Secretary who appears to have total discretion in selecting and appointing the person to fill the position. While admitting that one of the reasons for removing Campbell and appointing Franke was to improve the chances of USDA on reconsideration, the Secretary asserts that the primary reason was that Campbell so "grossly misinterpreted" the court's decision ordering a remand that he was incapable of exercising an objective review. Reduced to its essence this is a claim that the Secretary's delegation can be withdrawn before reconsideration any time he disagrees with the Judicial Officer's conclusion. Yet discovery in this case disclosed that Judicial Officers had made hundreds of decisions since 1940, and none had ever had his delegation revoked on this ground. If the Judicial Officer is to have stature as an independent decision-maker, this argument of the Secretary cannot be accepted.

B.

The actions of USDA in this case do not appear to have violated APA § 554(d). The clear purpose of this section is to separate the investigative and prosecutorial functions from the adjudicative function. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 41, 70 S.Ct. 445, 450, 94 L.Ed. 616, modified, 339 U.S. 908, 70 S.Ct. 564, 94 L.Ed. 1336 (1950). We do not accept the Secretary's position that § 554(d) is to be read so narrowly that it applies only to cases where the same person acts as prosecutor or investigator and judge. However, so far as this record shows neither Franke nor Davis had any prior contact with the Utica case, and there was no showing that anyone

in USDA actually influenced the decision on reconsideration. Nor was there any showing that either Franke or Davis was acquainted with *ex parte* information about the case. By regulation USDA has specifically prohibited *ex parte* communications between investigators or prosecutors and the Judicial Officer:

(a) At no stage of the proceeding between its institution and the issuance of the final decision shall the Judge or Judicial Officer discuss *ex parte* the merits of the proceeding with any person who is connected with the proceeding in an advocative or in an investigative capacity, or with any representative of such person: *Provided*, That procedural matters shall not be included within this limitation; and *Provided further*, That the Judge or Judicial Officer may discuss the merits of the case with such a person if all parties to the proceeding, or their attorneys have been given notice and an opportunity to participate. A memorandum of any such discussion shall be included in the record.

7 CFR § 1.151(a).

In *Grotier Inc. v. Federal Trade Commission*, 615 F.2d 1215, 1220 (9th Cir. 1980), the court stated the intention of Congress in adopting § 554(d) as follows:

We conclude that by forbidding adjudication by persons "engaged in the performance of investigative or prosecuting functions," Congress intended to preclude from decisionmaking in a particular case not only individuals with the title of "investigator" or "prosecutor," but all persons who had, in that or a factually related case, been involved with *ex parte* information, or who had developed, by prior involvement with the case, a "will to win."

[1, 2] The focus under § 554(d) is on the past involvement of the adjudicator. Under the peculiar facts of this case we include both Franke and Davis within the term "adjudicator" or "judge" because of Franke's obvious reliance on Davis in all matters legal. In order for § 554(d) to cause disqualification where the adjudicator was not actually a prosecutor or investigator in the case or a factually related one, the person challenging his right to adjudicate has the burden of showing that some past involvement has acquainted him with *ex parte* information or engendered in him an unjudge-like "will to win." *Id.* at 1221. Though the "redelegation" of Franke as Judicial Officer was invalid for other reasons, the plain-

tiffs did not make this showing and we do not believe the move violated the Administrative Procedure Act.

IV.

A.

The Secretary does not quarrel with the indisputable fact that Anglo-American law does not permit anyone to be the judge of his own case. As least since Lord Coke's decision in *Dr. Bonham's Case*, 8 Rep. 114a (C.P.1610), this has been the rule. The Secretary also recognizes that *Turney v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927), established the principle that it violates due process for a judge to have a direct and substantial interest in the outcome of a case before him. However, the Secretary argues that these principles were not involved in the removal of Campbell and the appointment of Franke, since Franke was not a party and was not shown to have any interest in the outcome of the case.

The Secretary places principal reliance on *Marcello v. Bonds*, 349 U.S. 302, 75 S.Ct. 757, 99 L.Ed. 1107 (1955), in arguing that the due process rights of Fenster and Utica were not violated in the present case. *Marcello* involved proceedings under § 242(b) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1252(b). The petitioner charged that the proceedings violated due process because they failed to provide for a fair and impartial hearing. The objection was that the special inquiry officer who conducted the deportation proceedings was subject to the supervision and control of officials in the Immigration Service charged with investigative and prosecuting functions. Rejecting this claim, the Court stated:

The contention is without substance when considered against the long-standing practice in deportation proceedings, judicially approved in numerous decisions in the federal courts, and against the special considerations applicable to deportation which the Congress may take into account in exercising its particularly broad discretion in immigration matters.

Id. at 311, 75 S.Ct. at 762. *Marcello* appears to be limited to immigration cases.

The Supreme Court affirmed in *Withrow v. Larkin*, 421 U.S. 35, 46, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712 (1975), that the due process requirement of a fair trial in a fair tribunal "applies to administrative agencies which adjudicate as well as to courts." (Citation omitted). Nevertheless, the Court distinguished cases where the proba-

bility of actual bias is "too high to be constitutionally tolerable" from normal administrative adjudication:

The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.

Id. at 47, 95 S.Ct. at 1464.

B.

[3] There can be no doubt that the requirement of separation of functions is relaxed in administrative adjudication. However, the requirement of a fair trial before a fair tribunal has not been eliminated. *Withrow v. Larkin*. This concept requires the appearance of fairness and the absence of a probability of outside influences on the adjudicator; it does not require proof of actual partiality.

In *Amos Treat & Co. v. Securities and Exchange Commission*, 306 F.2d 260 (D.C. Cir.1962), the court considered a challenge to a former division director of the SEC participating after his appointment as a commissioner in a case in which he had prior involvement. The dual role of the commissioner was challenged both under the APA and on due process grounds. The decision was based on due process considerations. *Id.* at 267. In attempting to determine the application of due process to administrative adjudications the court quoted *Hannah v. Larche*, 363 U.S. 420, 442, 80 S.Ct. 1502, 1514, 4 L.Ed.2d 1307 (1960):

"Its exact boundaries are undefinable, and its content varies according to specific factual contexts. Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process."

306 F.2d at 263 (footnote omitted). The court concluded that quasi-judicial proceedings must entail, "at the very least," a fair trial,

quoting *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 90 L.Ed. 942 (1955):

"A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness."

306 F.2d at 263. *Hannah* was a civil rights case and *Murchison* was a criminal case, yet the court turned to them for guidance in determining what process is due in administrative proceedings of a judicial or quasi-judicial nature.

[4] We believe this is a case where the plaintiffs have shown the risk of unfairness to be "intolerably high." Every disappointed litigant would doubtless like to replace a judge who in the regular course of his or her duties has decided a case against the litigant and present a motion for a new trial or for reconsideration to a different judge of his own choosing. All notions of judicial impartiality would be abandoned if such a procedure were permitted.

There is no guarantee of fairness when the one who appoints a judge has the power to remove the judge before the end of proceedings for rendering a decision which displeases the appointer. Yet that is exactly what occurred in this case. Campbell was appointed Judicial Officer long before the *Utica* case arose, and considered the case in the normal course of his duties. When Campbell rendered a decision in the case with which USDA "violently disagreed," officials of the department unceremoniously removed him and presented a petition for reconsideration to their hand-picked replacement.

It is of no consequence for due process purposes that Fenster and *Utica* were unable to prove actual bias on the part of Franke or Davis. The officials who made the revocation and redelegation decision chose a non-career employee with no background in law or adjudication to replace Campbell. They assigned a legal advisor to the new Judicial Officer who worked under an official who was directly involved in prosecution of the *Utica* case. Such manipulation of a judicial, or quasi-judicial, system cannot be permitted. The due process clause guarantees as much. As the court stated in *D.C. Federation of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1246-47 (D.C.Cir.1971), *cert. denied*, 405 U.S. 1030, 92 S.Ct. 1290, 31 L.Ed.2d 489 (1972):

With regard to judicial decisionmaking, whether by court or agency, the appearance of bias or pressure may be no less objectionable than the reality.

V.

Nothing in this opinion should be perceived as minimizing the seriousness of Fenster's criminal activities. Bribing an inspector does strike at the heart of the meat inspection program and cannot be tolerated. As we wrote in our earlier unpublished opinion in this case:

The more closely the conduct strikes to the policies of the Federal Meat Inspection Act, the more likely it alone will support a determination of unfitness regardless of the mitigating facts present. See *Wyszynski Provision, Co., Inc. v. Sec. of Agriculture*, 538 F.Supp. 361, 364 (E.D.Pa.1982).

Judicial Officer Campbell properly concerned himself with the nature of Fenster's criminal activities and the possible harm to the public which could flow from them. It is not certain that Campbell properly construed this court's remand order in considering mitigating circumstances. However, that is not the issue presently before us. Whether the Judicial Officer was correct or incorrect in his application of the law, the Secretary's efforts to change the result by the methods described in this opinion cannot be permitted to succeed.

The judgment of the district court is reversed, and the case is remanded with directions to remand it to the Secretary for re-entry of Judicial Officer Campbell's order dismissing the complaint against Utica and Fenster.

DISCIPLINARY DECISIONS

In re: THE BIG "O" HAMBURGER CO. INC. FMIA Docket No. 93. D.
cided January 9, 1985.

Violation of the Federal Meat Inspection Act.

Jerry Raley, for complainant.

William Condon, New York, N.Y., for respondent.

Decision by Edward H. McGrail, Administrative Law Judge.

STIPULATION AND CONSENT DECISION

These are proceedings under Title I of the Federal Meat Inspection Act (FMIA) as amended (21 U.S.C. §§ 601 *et seq.*) to withhold and deny inspection services under the above acts to the respondent. These proceedings were initiated by a complaint filed on September 9, 1985, by the Administrator of the United States Department of Agriculture's Food Safety and Inspection Service. Respondent filed its answer to the complaint on October 4, 1985.

The parties have agreed that these proceedings should be terminated by the entry of the Consent Decision set forth below and have agreed to the following stipulation:

1. For purposes of this stipulation and the provisions of the Consent Decision only, respondent admits all of the jurisdictional allegations set forth herein, admits the findings of fact set out below, and waives:

(a) Any further procedural steps;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or bases thereof; and

(c) All rights to seek judicial review or otherwise to challenge or contest the validity of this decision.

2. Respondent waives any action against the United States Department of Agriculture, under the Equal Access to Justice Act of 1980, Pub. L. 96-481, which went into effect October 1, 1981, for fees and other expenses incurred by Respondent in connection with this proceeding.

3. This Stipulation and Consent Decision are for settlement purpose in this proceeding only and do not otherwise constitute an admission or denial by respondent that it has violated the regulations or statutes involved.

FINDINGS OF FACT

I

Respondent, at all times material, was a company which operated a meat processing establishment in Brooklyn, New York, and was a recipient of meat inspection services under Title I of the FMIA. The respondent's mailing address is 218 Knickerbocker Avenue, Brooklyn, New York.

II

On or about June 14, 1985, in the United States District Court for the Eastern District of New York, the respondent was convicted of knowingly and willfully transporting in commerce meat food products of beef, which were capable of use as human food, and which were adulterated and misbranded in violation of the FMIA.

CONCLUSION

Inasmuch as the parties have agreed to the provisions set forth in the following Consent Decision in disposition of this proceeding, such Decision will be issued.

ORDER

Inspection services under Title I of the FMIA are withheld from and denied to the respondent, its successors, affiliates and assignees for a period of one year. However, said withholding and denial shall be suspended and held in abeyance and inspection services shall be provided to respondent so long as, in addition to all other requirements of inspection:

1. Respondent does not manufacture, handle, sell or transport any ground meat item which contains any added water, binders or extenders except as provided in special conditions number 2 and 3 of this order and 9 CFR § 319.15 (a) and (b).

2. After the effective date of this stipulation and consent decision, the respondent may handle, sell and transport its remaining inventory of ground meat items containing partially defatted beef fatty tissue, provided that all such activity shall cease at close-of-business on February 28, 1986.

3. Respondent may manufacture, handle, sell and transport ground meat items containing texturized vegetable protein with water in quantities adequate to facilitate mixing; provided such products are properly identified and/or labeled.

4. Respondent does not purchase, handle, or store at the official establishment any item, other than texturized vegetable pro-

tein, which could be used as an extender or binder in an uncooked meat food product.

5. Respondent maintains the inventory of texturized vegetable protein in a controlled or secured area of the plant.

6. Respondent maintains complete records of all transactions concerning the texturized vegetable protein including inventory with dates and amounts received as well as amounts used and amounts of the product which the additive was used in.

7. Respondent does not accept or receive product returned due to its condition or the condition of the box or container without prior notice to and supervision by the on-site U.S.D.A. Inspector.

8. Respondent does not process, recondition, wash, trim or separate any off-condition product without the knowledge and supervision of the USDA Inspector.

9. Respondent does not process, handle, or store custom exempt products or game, whether for customers, employees, the owner, friends or relatives.

10. Respondent maintains full, complete, accurate and appropriate written records of its business activities.

11. Respondent makes a detailed semiannual written report to the Meat and Poultry Inspection Office's Area Supervisor, New York, New York, concerning its adherence to this Stipulation and Consent Decision with a copy to the establishment's Inspector in Charge. The first such report is due July 1, 1986.

12. Respondent does not knowingly hire or permit the employment of any person who has been convicted of any violations of the FMIA, the PPIA, similar State and local food safety laws or of any crime of moral turpitude.

13. Respondent makes a request to the establishment's inspector that any of its formulations and labels containing additives other than water and texturized vegetable protein be rescinded.

The special conditions set forth in paragraphs 1 through 13 shall be applicable for a period of five years. During the five-year period, the Secretary shall have the right to summarily withdraw inspection service upon a finding by appropriate national headquarters staff of a violation of any special condition set forth in paragraphs 1 through 12. Any summary withdrawal of inspection service shall be subject to respondent's right to request an expedited hearing on the violations alleged.

This order shall not be construed as precluding the Department from taking other appropriate action, including criminal referral, for violations of the FMIA.

*In re: SIXTY-SIX PACKING CO. INC. FMIA Docket No. 87. Decided
January 24, 1986.*

Violation of the Federal Meat Inspection Act.

Kris Hegiri, for complainant.
Respondent, *pro se*.

Decision by Edward H. McGrail, Administrative Law Judge.

STIPULATION AND CONSENT DECISION AND ORDER

This is a proceeding under the Federal Meat Inspection Act (FMIA), as amended (21 U.S.C. § 601 *et seq.*), and the applicable Rules of Practice (9 CFR § 335.1 *et seq.*), to withdraw federal meat inspection service from Sixty-Six Packing Company, Inc. This proceeding was commenced by a complaint filed on April 24, 1985, by the Administrator of the Food Safety and Inspection Service (FSIS), United States Department of Agriculture (USDA), who is responsible for the administration of federal meat inspection services. The parties have agreed that this proceeding should be terminated by the entry of the consent decision set forth below and have agreed to the following stipulations:

1. For purposes of this stipulation and the provisions of this Consent Decision only, Sixty-Six Packing Company, Inc., hereafter referred to as the respondent, admits all of the jurisdictional allegations of the complaint, and waives:

(a) Any further procedural steps;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or bases thereof; and

(c) All rights to seek judicial review or to otherwise challenge or contest the validity of this decision.

2. This Stipulation and Consent Decision are for settlement purposes in this proceeding only and do not otherwise constitute an admission or denial by the respondent that it violated the regulations or statutes involved.

3. The respondent waives any action against the USDA under the Equal Access to Justice Act of 1980, (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Respondent is now, and at all times material herein, a corporation organized and existing under the laws of New Mexico and op-

more than one violation of any law, other than a felony, based upon the acquiring, handling, or distributing of unwholesome, mislabeled or deceptively packaged food, or fraud in connection with transactions in food; and

(b) Immediately terminates its connection with any such individual when that individual's conviction becomes known.

3. Respondent does not accept or receive any returned product due to its condition or the condition of the carton or container without prior notice to, and approval by, the on-site USDA Inspector.

4. Respondent does not handle, process, separate, wash, trim, recondition, or rework any returned or off-condition product without prior notice to and approval by the on-site USDA Inspector.

5. Respondent does not relabel any meat or meat food product without prior notice to, and approval by, the on-site USDA Inspector.

6. Respondent does not process, handle, or store custom exempt product or game animals, whether for customers, employees, friends, relatives, owners, directors or managers of Sixty-Six Packing Company, Inc., or others.

7. Respondent maintains full, complete, and accurate written records of all business activities applicable to the Federal Meat Inspection Act.

8. Respondent makes a detailed semi-annual written report to the Meat and Poultry Inspection Office's Area Supervisor, located at: 611 East 6th Street, Room 401, Austin, Texas 78701, concerning respondent's adherence to this Stipulation and Consent Decision. A copy of this report will be provided to the establishment's USDA Inspector In Charge. These semi-annual reports will be due on July 1 and December 1 of each year of probation.

II

The term violate, as used in paragraph I(1) herein, means a violation found upon conviction (or upon affirmation of conviction, if appealed), or upon a final decision in a formal adjudicatory proceeding before the Secretary (or upon affirmation of the Secretary's decision, if appealed), and if it is found that there is any such violation of any term of this Order, the suspension of the withdrawal and denial of inspection service under Title I of the FMIA shall be terminated and denial will become effective immediately. This shall not preclude the referral of any such violation to the Department of Justice for possible criminal or civil proceedings.

III

The special conditions set forth in paragraphs 2 through 8 shall be applicable for a period of (4) four years. During this (4) four-year period, from February 23, 1986, to February 23, 1990, the Secretary shall have the right to summarily withdraw inspection service upon a finding by appropriate national headquarters staff of a violation of any special condition set forth in paragraphs 2 through 8. Any summary withdrawal of inspection service shall be subject to respondent's right to request an expedited hearing on the violations alleged.

This Consent Decision and Order will become effective after being signed by an Administrative Law Judge and filed with the Hearing Clerk.

In re TRI STATE MEATS & PROVISIONS, INC. FMIA Docket No. 92 &
PPIA Docket No. 14. Decided February 20, 1986.

Withdrawal of Inspection Services of Fed. Meat Inspection Act & Poultry Products Inspection Act.

Harold J. Reshen, for complainant.

Michael F. Wulke, for respondent.

Decision by William J. Weber, Administrative Law Judge.

STIPULATION AND CONSENT DECISION AND ORDER

This is a proceeding under the Federal Meat Inspection Act (FMIA), as amended (21 U.S.C. §§ 601 *et seq.*), the Poultry Products Inspection Act (PPIA), as amended (21 U.S.C. §§ 451 *et seq.*), and the applicable Rules of Practice (7 CFR § 1.130 *et seq.* and 9 CFR § 335.1 *et seq.*), to withhold and deny federal meat inspection service to Tri State Meats & Provisions, Inc. This proceeding was commenced by a complaint filed on August 30, 1985, by the Administrator of the Food Safety and Inspection Service (FSIS), United States Department of Agriculture (USDA), who is responsible for the administration of federal meat and poultry inspection services. The parties have agreed that this proceeding should be terminated by the entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, Tri State Meats & Provisions, Inc., hereinafter referred to as respondent, admits all of the jurisdictional allegations of the complaint, and waives:

(a) Any further procedural steps;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or bases thereof; and

(c) All rights to seek judicial review or to otherwise challenge or contest the validity of this decision.

2. This Stipulation and Consent Decision is for settlement purposes in this proceeding only and does not otherwise constitute an admission or denial by the respondent that it violated the regulations or statutes involved.

3. The respondent waives any action against the USDA under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Respondent is an applicant seeking to operate a meat processing establishment located at 1376 Market Street, Linwood, Pennsylvania 19061.

2. On or about March 5, 1985, respondent applied for Federal meat and poultry products inspection services under Title I of the FMIA and under the PPJA, at the above-named establishment. The application listed Mark S. Perry as the President, Secretary and Treasurer of respondent.

3. Mark S. Perry is now, and at all times material herein was, listed as the only individual responsibly connected with the respondent's proposed operation.

4. Mark S. Perry formerly was the General Manager of the Summit Beef Company (hereinafter Summit), another meat processing establishment, which was located at 1376-1378 Market Street, Linwood, Pennsylvania.

5. On December 19, 1984, Administrative Law Judge Victor Palmer issued an Order indefinitely withdrawing inspection service under Title I of the FMIA from Summit. This Order furthermore denied and withheld such inspection service from Summit's officers, directors, successors and assigns, directly or through any corporate or other device, for an indefinite period of time.

CONCLUSIONS

Inasmuch as the parties have agreed to the provisions set forth in the following Consent Decision in disposition of this proceeding, such Order will be issued.

ORDER

Inspection services under Title I of the FMIA and under the PPIA are withheld from and denied to respondent, its officers, directors, partners, affiliates, successors, and assigns, directly or through any corporate device, for a period of five years.

HOWEVER, said withholding and denial shall be suspended and held in abeyance and inspection services shall be provided to respondent so long as, in addition to all other requirements of inspection, the conditions set forth in paragraphs 1 through 13 below, are met. During this five-year period, the Secretary shall have the right to summarily withdraw inspection service upon a finding by appropriate national headquarters staff of a violation of any special condition set forth in paragraphs 1 through 13. The summary withdrawal of inspection service shall be effective pending final determination of a violation in accordance with the applicable Rules of Practice. Such summary withdrawal shall have no relevance with respect to the final determination in the proceeding and will not preclude the respondent from requesting an expedited hearing.

1. Vincent L. Perry shall not associate with respondent, its successors, or assigns, directly or through any corporate or other device, as a partner, officer, director, shareholder, or employee; nor have access to respondent's premises; nor provide any direction or advice to or exercise any control over respondent, its successors or assigns, directly or through any corporate or other device; and

2. Respondent shall not knowingly employ or add any individual who has been convicted, in any federal or state court of any felony, or more than one violation of any law, other than a felony, based upon the acquiring, handling, or distribution of unwholesome, mislabeled or deceptively packaged food, or fraud in connection with transactions in food; and

3. Respondent immediately terminates its connection with any such individual when that individual's conviction becomes known; and

4. Respondent shall not violate any sections of the FMIA or the PPIA, or any regulations issued thereunder; and

5. Respondent shall identify any equipment used or located at its premises and which has been purchased or acquired after the effective date of this Order as belonging to Mark S. Perry; and

6. Respondent shall designate a full-time person who has overall, daily responsibility and control of respondent's operations (i.e., plant manager or plant superintendent) to conduct daily reviews of all areas of the official establishment for sanitation. In addition, this Designee shall review daily products for condition, processing procedures, formulation, and labeling of finished products. All in-

coming meat and meat food products will be checked for condition upon arrival. Any product of questionable condition will be held for inspection by the assigned inspector before use. All daily reviews shall be recorded in a hardbound Log Book, including but not limited to, the date, time, name of Designee conducting the review, the findings, suggestions and/or corrective action taken, and initialed by the Designee. Entries pertaining to incoming meat will include source, condition, and time received. The Log Book shall be available for review by USDA personnel; and

7. Respondent's Designee shall immediately notify the USDA on-site inspector of any operational or sanitation deficiencies that would or have caused work stoppage and corrective actions taken during the daily reviews; and

8. Respondent shall not prepare, handle or store custom exempt articles or game, whether for customers, employees, the owner, friends or relatives; and

9. Respondent shall not accept or receive any returned product due to its condition or the condition of the carton or container without prior notice to, and approval by, the on-site USDA inspector; and

10. Respondent shall not handle, prepare, separate, wash, trim, recondition, or rework any returned or off-condition product without prior notice to, and approval by, the on-site USDA inspector; and

11. Respondent shall maintain full, complete, and accurate written records of all other business activities applicable to the FMIA and the PPIA, which are available for review by USDA personnel; and

12. Respondent shall make a detailed semiannual written report to the Meat and Poultry Inspection Office's Area Supervisor, Fort Washington, Pennsylvania, concerning its adherence to this Stipulation and Consent Decision with a copy to the on-site USDA inspector. The first such report is due July 1, 1986. All following semiannual written reports shall be submitted to the Area Supervisor on June 1 and December 1 of each calendar year that this Consent Decision and Order is effective; and

13. Respondent shall afford duly authorized personnel of the USDA an opportunity to examine and to copy all such records, reports, and other documents required of the respondent in this Consent Decision and Order.

The Consent Decision and Order shall become effective upon being signed by an Administrative Law Judge and filed with the Hearing Clerk.

In re: PIETER VANDER ZWAN. P&S Docket No. 6512. Decided January 2, 1986.

Engaging in business while insolvent.

Thomas C. Heinz, for complainant.

Richard G. Anderson, for respondent.

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent's financial condition does not meet the requirements of the Act and that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph 1 of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Pieter Vander Zwan, doing business as Vander Zwan Livestock Commission Company and Vander Zwan Dairy Sales Yard, herein-after referred to as the respondent, is an individual whose business mailing address is 14380 Euclid Avenue, Chino, California 91710.

2. The respondent is, and at all times material herein was:

- (a) Engaged in the business of a market agency, selling livestock in commerce on a commission basis;
- (b) Engaged in the business of a dealer, buying and selling livestock in commerce for his own account; and
- (c) Registered with the Secretary of Agriculture as a market agency to sell livestock on a commission basis in commerce, and as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Pieter Vander Zwan, individually or through any corporate or other device, shall cease and desist from:

1. Engaging in the business of a market agency or dealer while his current liabilities exceed his current assets;
2. Failing to deposit in any Custodial Account for Shippers' Proceeds, within the time prescribed in section 201.42(c) of the regulations (9 CFR § 201.42(c)), amounts equal to the proceeds receivable from the sale of consigned livestock;
3. Failing to otherwise maintain any Custodial Account for Shippers' Proceeds in strict conformity with the provisions of section 201.42 of the regulations (9 CFR § 201.42);
4. Failing to pay, when due, the full purchase price of livestock;
5. Failing to pay the full purchase price of livestock;
6. Issuing checks in payment for livestock without having sufficient funds on deposit and available to pay such checks upon presentation; and
7. Failing to remit, when due, the net proceeds received from the sale of consigned livestock to the consignors of such livestock.

Respondent shall create, keep and maintain books, records and memoranda which fully and correctly disclose all his business transactions subject to the Act, including but not limited to: (1) fully completed purchase and sales invoices and (2) brand inspector tally sheets.

Respondent is suspended as a registrant under the Act for 60 days and thereafter until such time as he demonstrates that the deficit in his Custodial Account for Shippers' Proceeds has been eliminated, and that he is no longer insolvent. When respondent demonstrates that the deficit in his Custodial Account for Shippers' Proceeds has been eliminated and that he is no longer insolvent, a supplemental order will be issued in this proceeding terminating the suspension after the expiration of the 60-day period.

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: JAMES E. CHAPMAN. P&S Docket No. 6604. Decided January 2, 1986.

Violation of bonding requirements.

Roberta Swartzendruber, for complainant.
Respondent, pro se.

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph 1 of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. James E. Chapman, hereinafter referred to as the respondent, is an individual whose business mailing address is Route 2, Box 185F, Terry, Mississippi 39170.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

James E. Chapman, his agents and employees, directly or through any corporate or other device, in connection with his business subject to the Packers and Stockyards Act, shall cease and

desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating the suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of Nine Hundred Dollars (\$900.00).

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: JAMES E. SUHR. P&S Docket No. 6528. Decided January 6, 1986.

Violation of bonding requirements.

Jory M. Heckberg, for complainant.
Respondent, *pro se*.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent willfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. James E. Suhr, hereinafter referred to as the respondent, is an individual whose business mailing address is 500 Atlantic Street, Walnut, Iowa 51577.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of a dealer buying and selling livestock in commerce for his own account under his own name and under the trade name of Western Cattle Company; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent James E. Suhr, his agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until such time as he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is assessed a civil penalty in the amount of Seven Hundred Fifty Dollars (\$750.00).

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

Copies of this decision shall be served upon the parties.

ORDER

Respondent Doug Welch, his agents and employees, directly or indirectly, through any corporate or other device, shall cease and desist from:

1. Engaging in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person in connection with the purchase or sale, on a commission basis or otherwise, of that person's livestock;

2. Entering into, continuing in, or cooperating in any arrangement, agreement, understanding or course of business with any market agency selling livestock on a commission basis, or any employee or agent of such market agency for the purpose of purchasing consigned livestock at less than its fair or true market value;

3. Entering into, continuing in, or cooperating in any arrangement, agreement, understanding or course of business with any market agency selling livestock on a commission basis, or any employee or agent of such market agency, which would enable such market agency, employee or agent to engage in any act or practice which operates or would operate as a fraud or deceit upon the consignors of livestock to such market agency;

4. Entering into, continuing in, or cooperating in any arrangement, agreement, understanding or course of business with any market agency selling livestock on a commission basis, or any employee or agent of such market agency, to split or otherwise share in any profits derived from the resale of livestock purchased from consignments to such market agency;

5. Entering into, continuing in, or cooperating in any arrangement, agreement, understanding or course of business with any market agency buying livestock on a commission basis, or any employee or agent of such market agency, which would enable such market agency, employee or agent to engage in any act or practice which operates or would operate as a fraud or deceit upon the market agency or its customers or principals; and

6. Entering into, continuing in, or cooperating in any arrangement, agreement, understanding or course of business with any market agency buying livestock on a commission basis, or any employee or agent of such market agency to split or otherwise share in any profits derived from the sale of livestock sold to or bought on a commission basis for such market agency.

Respondent Doug Welch is suspended as a registrant under the Act for a period of six (6) months.

In accordance with section 312(b) of the Act (7 U.S.C. 213(b)), respondent Doug Welch is assessed a civil penalty in the amount of Ten Thousand dollars (\$10,000.00).

The provisions of this Order shall become effective on the next day after service of this Order on the respondents.

Copies of this decision shall be served upon the parties.

In re: JIMMIE A. BROWN. P&S Docket No. 6505. Decided January, 1986.

Violation of bonding requirements.

Peter V. Davis, for complainant.

Thibbea P. Wright, III, Fayetteville, AK, for respondent.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondent admits the jurisdictional allegations in paragraph 1 of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Jimmie A. Brown, hereinafter referred to as the respondent, is an individual whose address is Route 1, Box 293 A, Diamond, Missouri 64840.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account, and selling livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce.

CONCLUSIONS

Respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Jimmie A. Brown, individually or through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations; and

2. Failing to pay, when due, the full purchase price of livestock.

Respondent shall keep accounts, records and memoranda which fully and correctly disclose all transactions in connection with his operations subject to the Act, including purchase and sale invoices which show the true and correct purchaser or seller of the livestock, scale tickets, check-in or receiving tickets, and a cash receipts and disbursements journal.

Respondent is suspended as a registrant under the Act for a period of ninety (90) days and thereafter until such time as he complies fully with the bonding requirements under the Act and regulations and demonstrates that he is no longer insolvent as required by the order issued in P. & S. Docket No. 5474. When respondent demonstrates that he is in compliance with the bonding requirements and that he is no longer insolvent, a supplemental order will be issued in this proceeding terminating the suspension after the expiration of the 90-day period.

The provisions of this order shall become effective on the sixth day after service of this order on respondent.

In re: DOYLE HARMS. P&S Docket No. 6581. Decided January 5 1986.

Violation of bonding requirements.

Dennis Becker, for complainant.

Thomas P. Tinner, Aberdeen, S.D., for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyard Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Doyle Harms, doing business as Harms Livestock, hereinafter referred to as the respondent, is an individual whose business mailing address is Route 2, Box 56, Redfield, South Dakota 57469.

2. Respondent is, and at all times material herein was:

- (a) Engaged in the business of a market agency buying livestock in commerce on a commission basis; and
- (b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Doyle Harms, his agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required

under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is assessed a civil penalty in the amount of One Thousand Dollars (\$1,000.00).

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

Copies of this decision shall be served upon the parties.

In re: CORPORATE CAPITAL COMPANY, INC., and JOHN F. McNEELY.
P&S Docket No. 6488. Decided January 10, 1986.

Violation of the P&S Act.

Stephen Luparello, for complainant.

Respondent, *pro se*.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents willfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph 1 of the Complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Corporate Capital Company, Inc., herein referred to as the corporate respondent, is a Nevada corporation with its principal place of business located at Los Angeles, California. Its business mailing address is 4151 Cromwell Avenue, Los Angeles, California 90027.

2. The corporate respondent, at all times material herein, was:

such deposits or payments to the owners if respondents fail to comply with the terms and conditions of such agreement; and

7. Entering into an agreement with any person to lease livestock where such agreement contains false, invalid or misleading provisions, statements or promises or where such agreement is in direct conflict with the respondents' rights or interests in the livestock.

The respondents are prohibited from operating subject to the Act for a period of ten (10) years.

The provisions of this order shall become effective on the sixth day after service of this order on the respondents.

Copies of this decision shall be served upon the parties.

In re: GLEN L. SCHULTZ. P&S Docket No. 6582. Decided January 13, 1986.

Violation of bonding requirements.

Stephen Luparello, for complainant.
Respondent, pro se.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 et seq.) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent willfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 et seq.). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Glen L. Schultz, hereinafter referred to as the respondent, is an individual whose business address is R.R. #6, Highway 19, Box 162-A, Watertown, Wisconsin 53094.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of a market agency buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account and as a market agency to buy livestock in commerce on a commission basis.

CONCLUSIONS

The respondent having admitted to the jurisdictional facts and the parties having agreed to the entry of this decision, such decision shall be entered.

ORDER

Respondent Glen L. Schultz, his agents and employees, direct or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, without filing or maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Since respondent is now in full compliance with the bonding requirements, no suspension is warranted.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is assessed a civil penalty in the amount of Four Hundred Dollars (\$400.00).

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

Copies of this decision shall be served upon the parties.

In re: JOSEPH EICH. P&S Docket No. 6619. Decided January 16, 1986.

Violation of the P&S Act.

Roberta Seartsendruher, for complainant.

Respondent, pro se.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated

the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Joseph Eich, hereinafter referred to as the respondent, is an individual whose business mailing address is R.R. #3, Mendota, Illinois 61342.

2. The respondent at all times material herein was:

(a) Engaged in the business of a dealer, buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Joseph Eich, directly or through any corporate or other device, in connection with his operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the bank account upon which they are drawn to pay the checks when presented;

In re: HORACE W. McCURDY, P&S Docket No. 6641. Decided January 16, 1986.

Violation of the P&S Act.

Stephen Laparello, for complainant.

Respondent, *pro se*.

Decision by Edward M. McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyard Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent willfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph 1 of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Horace W. McCurdy, doing business as Jay Livestock Auction Market, hereinafter referred to as the respondent, is an individual whose address is P.O. Box 385, Jay, Florida 32565.

2. The respondent at all times material herein was:

(a) Engaged in the business of conducting the Jay Livestock Auction Market stockyard, a posted stockyard under the Act, hereinafter referred to as the stockyard;

(b) Engaged in the business of selling livestock on a commission basis at the stockyard; and

(c) Registered with the Secretary of Agriculture as a market agency to sell livestock on a commission basis in commerce.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Horace W. McCurdy, his agents and employees, directly or through any corporate or other device, in connection with his operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Failing to deposit in his Custodial Account for Shippers' Proceeds, within the times prescribed in section 201.42(c) of the regulations (9 CFR § 201.42(c)), an amount equal to the proceeds receivable from the sale of consigned livestock;
2. Failing to otherwise maintain his Custodial Account for Shippers' Proceeds in strict conformity with the provisions of section 201.42 of the regulations (9 CFR § 201.42);
3. Issuing checks in payment of the proceeds resulting from the sale of consigned livestock without having and maintaining sufficient funds on deposit and available in the bank account upon which they are drawn to pay such checks when presented; and
4. Failing to remit to the owners and consignors of livestock, when due, the net proceeds resulting from the sale of consigned livestock.

The respondent is suspended as a registrant under the Act for a period of twenty-eight (28) days.

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

Copies of this decision shall be served upon the parties.

In re: LINSKY E. ECKERT, RONALD T. BOWMAN and GEORGE YOUNG.
P&S Docket No. 6474. Decided January 22, 1986.

Violation of the P&S Act.

Eric Paul, for complainant.

Daniel W. Olsen, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION WITH RESPECT TO RONALD T. BOWMAN & GEORGE YOUNG

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents willfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision pro-

visions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondent Bowman and Young admit the jurisdictional allegations in paragraph II of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

(1) Ronald T. Bowman and George Young, doing business as United Livestock Commission Co., hereinafter referred to as respondents Bowman and Young, are partners whose business mailing address is Pershing Road, Maquoketa, Iowa 52060.

(2) Respondents Bowman and Young are, and at all times material herein were:

(a) Engaged in the business of buying and selling livestock in commerce on a commission basis;

(b) Engaged in the business of buying and selling livestock in commerce for their own account and for the accounts of others;

(c) Registered with the Secretary of Agriculture as a market agency to sell livestock in commerce on a commission basis; and

(d) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for their own account.

CONCLUSIONS

The respondents having admitted the jurisdictional facts neither admitting or denying the remaining allegations and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents Ronald T. Bowman and George Young, their agents and employees, directly or through any corporate or other device in connection with their activities subject to the Packers and Stockyards Act, shall cease and desist from:

(1) Failing to pay, when due, the full purchase price of livestock;

(2) Failing to pay the full purchase price of livestock; and

(3) Engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining

a reasonable bond or its equivalent as required by the Act and the regulations.

Respondents Ronald T. Bowman and George Young are suspended as registrants for a period of seven (7) days.

In accordance with section 312(b) of the Act, respondents Ronald T. Bowman and George Young are jointly and severally assessed a civil penalty in the amount of four thousand dollars (\$4,000.00). One thousand dollars of which shall be payable on February 23, 1986, and the remaining \$3,000 that shall be payable in ten monthly installments of \$300 each commencing March 21, 1986.

The provisions of this order shall become effective on February 23, 1986 and service of this decision on the respondents has been made on January 21, 1986.

Copies of this decision shall be served upon the parties.

In re: D.M. "NICK" SMITH. P&S Docket No. 6649. Decided January 22, 1986.

Violation of bonding requirements.

In E. Bruner, for complainant.

William Glaser, Dalhart, TX., for respondent.

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent willfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph 1 of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. D. M. "Nick" Smith, hereinafter referred to as the respondent is an individual whose mailing address is 1302 Willow Lane, Doherty, Texas 79022.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of a dealer buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Smith, his agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is assessed a civil penalty in the amount of One Thousand Dollars (\$1,000.00).

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

Copies of this decision shall be served upon the parties.

In re: GRANT CITY LIVESTOCK MARKET, INC., and GEORGE YOUNG.
P&S Docket No. 6418. Decided January 23, 1986.

Engaging in business while insolvent.

Eric Paul, for complainant.

Ernest A. Von Hester, for respondents.

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture.

ment of Agriculture, alleging that the financial condition of the corporate respondent does not meet the requirements of the Act and that the respondents wilfully violated the Act and the regulations promulgated thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Respondent Grant City Livestock Market, Inc., hereinafter referred to as the corporate respondent, is a corporation organized under the laws of the State of Missouri, with its principal place of business located at Grant City, Missouri. The corporate respondent's business mailing address is Box N, Grant City, Missouri 64456.

2. The corporate respondent is, and at all times material herein was:

(a) Engaged in the business of conducting and operating the Grant City Livestock Market, Inc., stockyard, a stockyard posted under and subject to the provisions of the Act, herein referred to as the stockyard;

(b) Engaged in the business of a market agency, selling livestock on a commission basis at the stockyard; and

(c) Engaged in the business of a dealer, buying and selling livestock in commerce for its own account and for the accounts of others.

3. The corporate respondent is, and at all times material herein was, registered with the Secretary of Agriculture as a market agency to sell livestock on a commission basis in commerce.

4. Respondent George Young, hereinafter referred to as the individual respondent, is an individual whose business mailing address is Box N, Grant City, Missouri 64456.

5. The individual respondent is the owner, president and general manager of the corporate respondent. The individual respondent is, and at all times material herein was, responsible for the direction, management and control of the corporate respondent.

6. The individual respondent is, and at all times material herein was, engaged individually in the business of a dealer, buying and

selling livestock in commerce for his own account and for the accounts of others.

7. The individual respondent is, and at all times material herein was, registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce.

CONCLUSIONS

The respondents having admitted the jurisdictional facts only and neither admitting nor denying the remaining allegations in the complaint and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Grant City Livestock Market, Inc., its officers, directors, agents and employees, successors and assigns, and respondent George Young, his agents and employees, directly or through any corporate or other device, shall cease and desist from:

1. Engaging in business as a market agency or dealer while insolvent, that is, while their current liabilities exceed their current assets;

2. Failing to deposit to their Custodial Account for Shippers' Proceeds, within the times prescribed by section 201.42 of the regulations (9 CFR § 201.42), amounts equal to the proceeds due consignors for livestock purchased by respondents for market support, and amounts equal to the outstanding proceeds receivable due from other purchasers of consigned livestock;

3. Failing to otherwise maintain their Custodial Account for Shippers' Proceeds in strict conformity with the provisions of section 201.42 of the regulations (9 CFR § 201.42);

4. Using funds received as proceeds from the sale of consigned livestock for purposes of their own or for any purpose other than the payment of net proceeds to the owners, consignors or shippers of such livestock, or the payment of sums due the respondents for lawful marketing charges; and

5. Preparing or issuing accounts of sale which fail to disclose the full, true and correct names of the consignors, owners or shippers of livestock.

Respondents shall keep and maintain accounts, records and memoranda which fully and correctly disclose the true nature of all transactions involved in their businesses subject to the Act including: (1) notes payable records; (2) proceeds receivable and accounts receivable records; (3) sales invoices; (4) scale tickets; and (5) load make-up records of all livestock sold.

Respondent Grant City Livestock Market, Inc., is suspended as a registrant under the Act for a period of 14 days and thereafter until it demonstrates that it is no longer insolvent and that the deficiency in its Custodial Account for Shippers' Proceeds has been eliminated. When respondent Grant City Livestock Market, Inc., demonstrates that it is no longer insolvent, and that the deficiency in its Custodial Account for Shippers' Proceeds has been eliminated, a supplemental order will be issued in this proceeding terminating the suspension after the expiration of the 14-day period.

Respondent George Young is suspended as a registrant under the Act for a period of 14 days.

The provisions of this order shall become effective February 23, 1986.

Copies of this decision shall be served upon the parties.

*In re: MEATHOUSE, INC., GENE THORPE, and RUSSELL THORP. P&S
Docket No. 6252. Decided January 24, 1986.*

Violation of the P&S Act.

Peter V. Train, for complainant.

J. Robert Leach, Everett, WA., for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the financial condition of Meathouse, Inc. does not meet the requirements of the Act and that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). The complaint was subsequently amended. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Meathouse, Inc., hereinafter referred to as the corporate respondent, is a corporation whose mailing address is 19829 Niederle Road, Monroe, Washington 98272.

2. The corporate respondent at all times material herein was:

(a) Engaged in the business of buying livestock in commerce for purposes of slaughter, and of manufacturing or preparing meat and meat food products for sale or shipment in commerce; and

(b) A packer within the meaning of and subject to the provisions of the Act.

3. Gene Thorpe and Russell Thorp, hereinafter referred to as the individual respondents, are individuals whose business address is 19829 Niederle Road, Monroe, Washington 98272.

4. The individual respondents at all times material herein were:

(a) Manager and President, respectively, of the corporate respondent; and

(b) Jointly responsible for the management, direction and control of the corporate respondent.

5. The individual respondents are, and have been since approximately September 30, 1983, partners engaged in the business of buying livestock in commerce for purposes of slaughter, and of manufacturing or preparing meat and meat food products for sale in shipment in commerce operating under the trade name Thorp Meats, the successor operation to respondent Meathouse, Inc.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Meathouse, Inc., its successors, officers, directors, agents and employees, and the individual respondents Gene Thorpe and Russell Thorp, individually, as partners doing business as Thorp Meats, or through any corporate or other device, in connection with their operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Purchasing livestock in commerce while insolvent, i.e., while current liabilities exceed current assets, unless the respondents pay the full purchase price of the livestock at the time of purchase in U.S. currency, by cashier's check or by wire transfer.

2. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available to pay such checks when presented for payment; and

3. Failing to make payment or failing to mail a check, where the seller has explicitly agreed in writing that payment may be made by the mailing of a check, before the close of the next business day following the purchase of livestock and the transfer of possession thereof.

Respondents shall prepare and maintain accounts, records and memoranda which fully and correctly disclose all transactions in their business as a packer subject to the Act including: (1) kill sheets and (2) accountings to sellers which show the number of head purchased and the weight and price of individually identified livestock carcasses.

In accordance with section 203(b) of the Act (7 U.S.C. 193(b)), respondents Meathouse, Inc., Gene Thorpe and Russell Thorp are jointly and severally assessed a civil penalty in the amount of \$8,000.00, of which \$7,000.00 shall be held in abeyance for a period of 5 years provided however that if respondents violate this Order in any manner within this period, the full amount of the civil penalty shall immediately become due and payable.

This order shall have the same force and effect as if entered after full hearing and shall be effective on the first day after service upon respondents.

Copies of this decision shall be served upon the parties.

In re: CRISSMAN, INC., and JACK G. CRISSMAN. P&S Docket No. 6460.
Decided January 24, 1986.

Violation of the P&S Act.

Allan R. Kahan, for complainant.
Respondent, pro se.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyard Act (7 U.S.C. § 181 *et seq.*) by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph 1 of the Complaint and Notice of Hearing and specifically

admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Crissman, Inc., hereinafter referred to as the corporate respondent, is a corporation organized and operating in the State of Pennsylvania. Its business mailing address is Box No. 57, Castanes, Pennsylvania 17726.

2. The corporate respondent is, and at all times material herein was:

(a) Engaged in the business of purchasing livestock in commerce for the purpose of slaughter; and of marketing meat, meat food products, or livestock products in an unmanufactured form acting as a wholesale broker, dealer or distributor in commerce; and

(b) A packer within the meaning of and subject to the provisions of the Act.

3. Jack G. Crissman, hereinafter referred to as the individual respondent, is an individual whose mailing address is 100 Bridge Street, Castanes, Pennsylvania 17726.

4. The individual respondent is, and at all times material herein was:

(a) President and Treasurer of respondent Crissman, Inc.; and

(b) In combination with other family members, an owner of the corporate respondent; and

(c) Responsible for the management, direction and control of the practices and activities of respondent Crissman, Inc.

5. The individual respondent was, at all times material herein, a packer within the meaning of the Act and subject to the provisions of the Act.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of the decision, such decision will be entered.

ORDER

Respondent Crissman, Inc., its officers, directors, agents and employees, and respondent Jack G. Crissman directly or through any

corporate or other device, shall cease and desist from failing to pay, and from failing to pay when due, for meat or meat food products.

Respondent Crissman, Inc. and Jack G. Crissman are hereby jointly and severally assessed a civil penalty of Thirty Thousand Dollars (\$30,000.00).

The provisions of this order shall become effective on the first day after service of this order on the respondents.

Copies of this decision shall be served upon the parties.

In re: RICHARD D. BAUMERT. P&S Docket No. 6586. Decided February 8, 1986.

Violation of bonding requirements.

*Andrew Y. Stanton, for complainant,
vs. J. Trester, for respondent.*

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF
DEFAULT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act and the regulations promulgated hereunder (9 CFR § 201.1 *et seq.*).

Copies of the complaint and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the Act were served on the respondent by certified mail. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. (a) Richard D. Baumert, hereinafter referred to as the respondent, is an individual whose business mailing address is R.D. 1, Herndon, Pennsylvania 17830.

(b) Respondent is, and at all times material herein was:

(1) Engaged in the business of a dealer buying and selling livestock in commerce for his own account; and

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

2. The Packers and Stockyards Administration notified respondent on May 24, 1985, that the \$22,000.00 surety bond he maintained to secure the performance of his livestock obligations under the Act was being terminated effective June 14, 1985, and that it was necessary to file a bond or bond equivalent in the amount of \$30,000.00 before continuing in dealer operations. Respondent was further notified that if he continued his livestock operations without adequate bond coverage or its equivalent, he would be in violation of section 312(a) of the Act and sections 201.29 and 201.30 of the regulations. Notwithstanding such notice, respondent has continued to engage in the business of a dealer buying and selling livestock in commerce for his own account, without maintaining bond coverage or its equivalent, as required by the Act and the regulations.

CONCLUSIONS

By reason of the facts found in Finding of Fact 2 herein, respondent has willfully violated section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations (9 CFR §§ 201.29, 201.30).

ORDER

Respondent Richard D. Baumert, his agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until such time as he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is assessed a civil penalty in the amount of One Thousand Five Hundred Dollars (\$1,500.00).

This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 CFR §§ 1.139, 1.145).

Copies hereof shall be served on the parties.

[The Decision and Order Upon Admission of Facts by Reason of Default became final on February 8, 1986.—Ed.]

In re: DIRECT MEAT CO. INC., et al. P&S Docket No. 6552. Decided January 21, 1986.

Violation of the P&S Act.

Peter Truic, for complainant.

Arthur J. Schuh, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION AND ORDER AS TO LAWRENCE J. AMANN UPON ADMISSION OF
FACTS BY REASON OF DEFAULT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondents wilfully violated the Act.

Copies of the Complaint and Notice of Hearing and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the Act were served on the respondents. Respondents were informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the Complaint and Notice of Hearing.

Respondents have failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the Complaint and Notice of Hearing, which are admitted by respondents' failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

CONCLUSIONS

By reason of the facts found in Finding of Fact 3 herein, respondents have wilfully violated section 202(a) of the Act (7 U.S.C. § 192(a)).

By reason of the facts found in Finding of Fact 4 herein, respondents have wilfully violated sections 202(a) and 409(a) of the Act (7 U.S.C. §§ 192(a), 228b(a)).

ORDER

Respondent Lawrence J. Amann, his agents or employees, directly or through any corporate or other device, in connection with his operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the bank account upon which they are drawn to pay the checks when presented;

2. Failing to pay, when due, for livestock purchases; and

3. Failing to pay for livestock purchases.

This decision and order shall become final and effective without further proceedings 35 days after service hereof unless appealed to the Judicial Officer with 30 days after service (7 CFR # 1.139, 1.145).

Copies hereof shall be served on the parties.

[The Decision and Order became final on January 21, 1986.—Ed.]

In re: OKMULGEE STOCKYARDS, INC. P&S Docket No. 6579. Decided January 21, 1986.

Violation of bonding requirements.

Peter Train, for complainant.

Respondent, pro se.

Decision by William J. Weber, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF
DEFAULT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the re-

spondent wilfully violated the Act and the regulations promulgated thereunder (9 CFR § 201.1 *et seq.*).

Copies of the complaint and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the Act were personally served on the respondent. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. (a) Okmulgee Stockyards, Inc., hereinafter referred to as the respondent, is a corporation existing under the laws of the State of Oklahoma with its principal place of business in Okmulgee, Oklahoma. Respondent's business mailing address is P. O. Box 1361, Okmulgee, Oklahoma 74447.

(b) The respondent is, and at all times material herein was:

(1) Engaged in the business of conducting and operating the Okmulgee Stockyards, Inc., stockyard, a posted stockyard under the Act, hereinafter referred to as the stockyard;

(2) Engaged in the business of selling livestock in commerce on a commission basis at the stockyard; and

(3) Registered with the Secretary of Agriculture as a market agency to sell livestock in commerce on a commission basis.

2. Respondent was notified by certified mail on June 13, 1985, that the \$65,000.00 surety bond which it maintained to secure the performance of its livestock obligations under the Act would terminate on July 10, 1985. Respondent was further notified that if it continued its livestock operations under the Act without providing adequate bond coverage or its equivalent, it would be in violation of section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations. Notwithstanding such notice, respondent has continued to engage in the business of a market agency selling livestock in commerce on a commission basis at the stockyard without maintaining an adequate bond or its equivalent as required by the Act and the regulations.

CONCLUSIONS

By reason of the facts found in Finding of Fact 2 herein, respondent has wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations (9 CFR §§ 201.29, 201.30).

ORDER

Respondent Okmulgee Stockyards, Inc., its officers, directors, agents and employees, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until it complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that it is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating the suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of Three thousand Dollars (\$3,000.00).

This decision and order shall become final and effective without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 CFR §§ 1.139, 1.145).

Copies hereof shall be served on the parties.

[The Decision and Order became final on January 21, 1986.—Ed.]

re: HILL PACKING COMPANY, INC., a corporation, and BERNIE M. LAYDEN, an individual. P&S Docket No. 6504. Decided February 4, 1986.

Violation of the P&S Act.

Berta Stewart-Zandruher, for complainant.
Respondent, pro se.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administra-

tion, United States Department of Agriculture, alleging that the respondents wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the Complaint and Notice of Hearing and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this matter and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Hill Packing Company, Inc., hereinafter referred to as the corporate respondent, is a corporation whose principal place of business was located in Danville, Illinois. Corporate respondent's mailing address is Box 416-F, Danville, Illinois 61832.

2. The corporate respondent, at all times material herein, was

(a) Engaged in the business of buying livestock in commerce for purposes of slaughter; and

(b) A packer within the meaning of and subject to the provisions of the Act.

3. Bernice M. Layden, hereinafter referred to as the individual respondent, is an individual whose mailing address is R.R. 3, Box 228, Hoopeston, Illinois 60942.

4. Individual respondent, at all times material herein, was:

(a) Owner, in combination with other family members, of corporate respondent's stock;

(b) Secretary of the corporate respondent; and

(c) Responsible for the direction, management and control of all business activities of the corporate respondent.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Hill Packing Company, Inc., its officers, directors, agents, successors and assigns, and Bernice M. Layden, directly or through any corporate or other device, in connection with their business subject to the Act, shall cease and desist from:

1. Failing to pay, when due, the full purchase price of livestock; and

2. Failing to pay the full purchase price of livestock.

In accordance with section 203(b) of the Act (7 U.S.C. § 193(b)), respondent Bernice M. Layden is hereby assessed a civil penalty of one thousand dollars (\$1,000.00).

The provisions of this order shall become effective on the first day after service of this decision on the Respondents.

Copies of this decision shall be served upon the parties.

In re: HARLEE ROBERTS. P&S Docket No. 6527. Decided February 4, 1986.

Violation of bonding requirements.

Stephen Luparello, for complainant.
Respondent, *pro se*.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Harlee Roberts, hereinafter referred to as the respondent, is an individual whose business mailing address is P. O. Box 1415, Tifton, Georgia 31794.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of a dealer buying and selling livestock in commerce for his own account, and a market agency

buying livestock buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account and as a market agency to buy livestock in commerce on a commission basis. Such registration has been inactive since August 1, 1971.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Harleo Roberts, his agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act for a period of thirty (30) days and thereafter until such time as he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension after the expiration of the thirty day period.

In accordance with Section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is assessed a civil penalty in the amount of Three Thousand Dollars (\$3,000.00).

The provisions of this order shall become effective upon signature by the Administrative Law Judge.

Copies of this decision shall be served upon the parties.

In re: JOHN CLAY & COMPANY, of Ogden, Utah, RAYMOND C. WILLIAMS, and LEWIS E. HARPER. P&S Docket No. 6216. Decided February 5, 1986.

Violation of the P&S Act.

Eric Paul, for complainant.

James Z. Davis, Roy, Quincy & Nebeker, Ogden, Utah, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION RE RESPONDENT HARPER

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the financial condition of respondent John Clay & Company of Ogden, Utah, failed to meet the financial requirements of the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) and that the respondents wilfully violated the Act and regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondent Harper admits the jurisdictional allegations in paragraph III of the complaint for jurisdictional purposes only and the parties hereto further agree that clause (b)(4) be amended to provide that Respondent Harper was registered with the Secretary of Agriculture as a dealer who purchased livestock for slaughter only under an individual registration that has been inactive since June 1, 1957. Respondent Harper specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further proceedings, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision. Nothing contained herein shall constitute an admission, finding, or conclusion in any other proceeding or for any other purpose.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Lewis Harper, hereinafter referred to as respondent Harper, is an individual whose mailing address is 2530 East 5950 South, Ogden, Utah 84403.

2. Respondent Harper is and at all times material herein was:

(a) President and owner of 29% of the stock of the respondent Clay;

(b) Responsible for the management, direction and control of respondent Clay;

(c) A dealer and a market agency within the meaning of and subject to the Act; and

(d) Registered with the Secretary of Agriculture as a dealer to purchase livestock for slaughter only, under an individual registration that has been inactive since June 1, 1957.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent, Lewis E. Harper, directly or through any corporate or other device, shall cease and desist from:

1. Issuing drafts in payment for livestock without having and maintaining sufficient funds on deposit and available to pay such drafts when presented;

2. Failing to honor drafts, drawn and issued in payment for livestock, when presented for payment;

3. Issuing drafts which are not checks in payment for livestock without an express agreement in writing before the transaction by the seller that payment may be made by draft;

4. Failing to pay, when due, the full purchase price for livestock purchased.

Respondent Lewis E. Harper is suspended as a registrant under the Act for a period of one year *nunc pro tunc* as of January 1, 1985.

The provisions of this order shall become effective on the sixth day after service of this order on the respondents.

Copies of this decision shall be served upon the parties.

In re: YUMA MEAT CO. INC., RICHARD LESKA, and FRED LUKCH. P&S
Docket No. 6636. Decided February 5, 1986.

Violation of the P&S Act.

Barbara Harris, for complainant.
**respondent, pro se.*

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION WITH RESPECT TO YUMA MEAT CO. INC.

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint and Notice of Hearing

filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondent Yuma Meat Co., Inc. admits the jurisdictional allegations in paragraph 1 of the Complaint and Notice of Hearing and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Yuma Meat Co., Inc., hereinafter referred to as the corporate respondent, is an Arizona corporation whose business mailing address is 12700 Somerton Avenue, Yuma, Arizona 85365.

2. Corporate respondent, at all times material herein, was:

(a) Engaged in the business of buying livestock in commerce for purposes of slaughter; and

(b) A packer within the meaning of and subject to the provisions of the Act.

CONCLUSIONS

The corporate respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

The corporate respondent, its officers, directors, agents, employees, successors and assigns, directly or through any corporate or other device, in connection with its operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock purchases without having sufficient funds available in the bank account upon which such checks are drawn to pay such checks when presented; and

2. Failing to pay, when due, the full purchase price of livestock.

Such order shall have the same force and effect as if entered after full hearing and shall be effective on the first day after service upon the respondent.

Copies of this decision shall be served upon the parties.

In re: JOHNNY HORTON and WAYNE PRUITT. P&S Docket No. 451.
Decided February 14, 1986.

Violations of the P&S Act.

Peter V. Trais, for complainant.

Gerard D. Eflink, Van Hooser & Olsen, Kansas City, MO., for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent willfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph 1 of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Johnny Horton and Wayne Pruitt, hereinafter referred to as respondents, are partners doing business as Decatur Livestock Auction. Their business mailing address is P. O. Box 36, Decatur, Arkansas.

2. Respondents, as partners, are, and at all times material herein were:

(a) Engaged in the business of conducting and operating the Decatur Livestock Auction stockyard, a posted stockyard subject to the provisions of the Act, hereinafter referred to as the stockyard;

(b) Engaged in the business of a market agency selling livestock in commerce on a commission basis at the stockyard; and

(c) Registered with the Secretary of Agriculture as a market agency to sell livestock on a commission basis.

3. Respondent Johnny Horton is, and at all times material herein was:

(a) Engaged in the business of a dealer buying and selling livestock in commerce for his own account and as a market agency buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture in his individual capacity as a dealer to buy and sell livestock in commerce for his own account and as a market agency to buy livestock on a commission basis.

4. Respondent Wayne Pruitt is, and at all times material herein was, engaged in the business of a dealer buying and selling livestock in commerce for his own account and as a market agency buying livestock in commerce on a commission basis.

5. Respondent Wayne Pruitt is not registered with the Secretary of Agriculture as a dealer or market agency in his individual capacity.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents Johnny Horton and Wayne Pruitt, individually, as partners with each other or with other persons, their agents and employees, directly or through any corporate or other device, in connection with their operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Purchasing livestock consigned to any market agency in which they have an ownership interest, or are officers or employees, for resale for their own speculative account;

2. Permitting owners, officers, agents or employees to buy livestock out of consignment for resale for their own speculative account;

3. Permitting its auctioneers, weighmasters, ringmen, or other employees performing duties of comparable responsibility in connection with the actual conduct of the auction sales, to purchase livestock out of consignment for their own account, directly or indirectly, for speculative resale or to fill orders on an agency basis; and

4. Purchasing livestock out of accounts of sale or other accountings to true purchasers of the livestock and ship to the market agency.

Respondent Wayne Pruitt, his agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Act and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Respondents shall keep accounts, records and memoranda which fully and correctly disclose all transactions involved in their operations subject to the Act, including (1) accounts of sale and purchase invoices showing the true and correct names of the purchasers and consignors of livestock; (2) records showing the disposition of livestock purchased for market support; (3) records of accounts receivable, notes receivable, accounts payable and notes payable showing the date the receivable or payable was incurred, the amount and terms of payment of the receivable or payable, and the person owing or to whom is owed the receivable or payable; (4) deposit tickets showing the names of persons whose payments were being deposited; (5) check-in or receiving tickets showing the date and the name of the consignor; (6) scale tickets showing the date and the weighmaster; (7) records showing the disposition of livestock, and (8) ledgers or other records showing assets and liabilities, income and expenses.

Respondents are suspended as registrants under the Act for a period of 28 days and shall not engage in business either individually or as partners with each other or other persons as a market agency or dealer as those terms are defined in the Act during that period.

Respondent Pruitt shall not engage in business as a dealer or market agency subject to the Act in his individual capacity for the 28 day specified period of suspension and thereafter until such time as he demonstrates that he is in full compliance with the bonding and registration requirements under the Act and the regulations.

Respondent Johnny Horton is assessed a civil penalty in the amount of Three Thousand Dollars (\$3,000.00).

The provisions of this order shall become effective on the day after service of this decision on the respondents or on their attorney. In any event, the terms of this order shall be effective no later than February 21, 1986, and the suspension shall begin no later than February 21, 1986.

Copies of this decision shall be served on the parties.

In re: BOBBY JAMES PARROTT. P&S Docket No. 6651. Decided February 24, 1986.

Violation of bonding requirements.

Stephen Luparello, for complainant.
Respondent, pro se.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Bobby James Parrott, hereinafter referred to as the respondent, is an individual whose mailing address is Route 2, Box 370, Haskell, Texas 79521.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of a dealer buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Bobby James Parrott, his agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding

is required under the Packers and Stockyards Act, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Insofar as respondent is now in full compliance with the bonding requirements under the Act and the regulations, no suspension is warranted.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is assessed a civil penalty in the amount of Three Hundred and Fifty Dollars (\$350.00).

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

Copies of this decision shall be served upon the parties.

In re: HORST SCHOBER, NANCY WELLS, and NORTHERN NEW YORK
FARMERS' MARKETING COOPERATIVE, INC. P&S Docket No. 6182
Decided February 27, 1986.

Violation of the P&S Act.

In re the above cited, Administrative Law Judge John A. Campbell directed respondents from violating the Act and assessed a civil penalty of \$4000 against respondent Schober. Schober was directed to correct records of transactions, and of accounts. Respondent Wells was prohibited for period of six months from engaging in business as a market agency; from buying/selling livestock on commission, or for her own account or as employee/agent of vendor or purchaser. Respondents had engaged in false or deceptive practices to obtain money from livestock purchasers and misrepresented to their principals manner in which livestock was acquired. They also issued false or misleading invoices and used their own livestock to fill orders without disclosure to their principal.

Barbara Harris, for complainant.

David Welch, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 et seq.), hereafter referred to as the Act, instituted by a complaint filed on August 9, 1983, by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture.

The complaint charged (1) that the respondents entered into a conspiracy which allowed respondents Wells and Schober to bill and collect from their principal on the basis of inflated weights and prices in violation of sections 312(a) and 401 of the Act (7 U.S.C.

§§ 213(a), 221), and section 201.44 of the regulations (9 CFR § 201.44); (2) that respondent Schober consigned livestock to auction markets and then repurchased it for the accounts of his principals without disclosing his prior ownership of the livestock in violation of section 312(a) of the Act, and Section 201.44 of the regulations; and (3) that respondent Schober failed to properly keep his business records in conformity with section 401 of the Act.

The respondents filed answers in which they admitted the jurisdictional allegations of the complaint and denied the remaining allegations. On April 10, 1984, a consent decision was entered with respect to respondent Northern New York Farmers' Marketing Cooperative, Inc. With respect to the remaining respondents, an oral hearing was held in Syracuse, New York on July 9 and 10, 1985. Respondents Schober and Wells were represented by David L. Welch, Esq. of Potsdam, New York. Complainant was represented by Barbara S. Harris of the Office of the General Counsel, United States Department of Agriculture. At the start of the hearing, the complaint was amended to delete and revise certain portions thereof. Thereafter at the close of the hearing, the time was fixed for the filing of briefs.

Pages 8 and 9 of respondents' brief reads in part:

Respondents are alleged to have engaged in unfair, deceptive practices. With the exception of falsely inflating the price of beef, respondents admit the practices involved, but maintain the propriety of their actions.

It is maintained that the activities in question may be improper, but only ex post facto, and that the matter has improperly or unwisely been continued beyond the imposition of a cease and desist order.

Even if it is found that respondents intentionally violated the Act, the appropriate remedy at this time is an order to cease and desist.

FINDINGS OF FACT

1. (a) Respondent Horst Schober, herein referred to as Schober, is an individual whose business mailing address is R.R. 2, Potsdam, New York 13676.

(b) Respondent Schober at all times material herein was:

(1) Engaged in the business of buying livestock in commerce on a commission basis, and buying and selling livestock in commerce for his own account; and

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce.

2. (a) Respondent Nancy Wells, herein referred to as Wells, is an individual whose mailing address is North R.D. 1, North Lawrence, New York 12967.

3. At all times material herein, respondent Wells was employed by Schober to buy and sell livestock on his behalf and for his account.

4. Respondent Wells, at all times material herein, was engaged in the business of buying and selling livestock in commerce as the employee or agent of the vendor or purchaser.

5. Respondent Wells, at all times material herein, was a dealer within the meaning of that term as defined in the Act and subject to the provisions of the Act.

Increased Weights and Prices of Livestock Purchased for Principal

6. Respondents Schober and Wells regularly purchased calves at various auction markets on order for Ezra H. Good, Inc., of Denver, Pennsylvania.

7. The calves purchased by Schober and Wells on order for Ezra H. Good, Inc., were used to fill the Good order with Strauss Veal, Inc. of North Manchester, Indiana.

8. Schober's agreement with Ezra H. Good, Inc., provided that Schober purchase calves at auction markets with his own funds, truck them to a central collection point and furnish to Strauss Veal a purchase invoice showing the actual purchase weights and prices.

9. Schober did not provide Good with buyer's invoices reflecting his purchases. However, Schober was required to report the details of his purchases to Good, including the number of head purchased, the total weight of the calves and the total cost of the calves at each sale. Based upon this report, Good reimbursed Schober his reported purchase prices plus trucking, and paid him a buying commission for his services.

10. Schober's agreement with Ezra H. Good, Inc., provided that all the calves purchased for the company by Schober be purchased through the auction sale and that he turn over the calves at their original purchase weights and prices. It was not acceptable under their agreement for Schober to buy calves at one auction market, take them to a second auction market, consign them and then repurchase the calves to fill the Good order.

11. Mr. Amos Good of Ezra H. Good, Inc., testified that pursuant to an oral agreement between the parties, Schober purchased baby bob calves for Good's firm on a regular basis during 1981 and 1982.

and was paid a commission for his services. Good would instruct Schober as to the number of calves needed on a given day, the weight range required and the ceiling price to be paid. It was Good's expectation that Schober would buy the best quality calves at the lowest possible price. If Schober could buy calves at less than the ceiling price quoted, he was expected to turn them over to Good at the lower price. As noted in finding 10, it was not acceptable for Schober to buy calves at one market, take them to a second market for consignment and then repurchase them to fill his order with Good. In fact, as Mr. Good testified, if Schober were discovered engaging in this practice, his services would have been terminated.

12. Complainant's exhibits for the period June 14, 1982 through September 1982, substantiate that Wells and Schober purchased calves at several auction markets such as East Livestock Exchange and Empire Livestock Marketing Cooperative and received invoices from the markets documenting the actual purchase weights and prices of the calves. Accounts of sale issued to Wells and buyer's invoices issued to Schober by the Northern New York market purport to show that the calves, traced by ear tag numbers, were consigned on the same day to the Northern New York Farmers' Marketing Cooperative auction where they were repurchased by Schober for Good at weights and prices which were greater than Schober's original purchase weights and prices. When taken at face value, the Northern New York records appear to document normal consignment and sales transactions by respondents. However, as Mr. Marano and Mr. Johnson of the Packers & Stockyards Administration testified, the records establish that the animals originally purchased by respondents at East's or Empire were never consigned by respondents to the Northern New York market, did not pass through the auction ring, and were never purchased by Schober on a competitive basis.

Instead, respondents Wells and Schober, in consultation, arbitrarily determined prices and weights for the calves purchased for Good and then arranged for the necessary paperwork to be executed to document the purported consignment to the market and the purported purchase through the auction sale by Schober. As testified to by Mrs. Meister, the former officer manager at the Northern New York Market, the mechanics of the arrangement were easy to effect. The market's office personnel were instructed by the respondents to add or "mix in" the calves to Schober's buyer's invoices at the new and falsely increased weights and prices. Schober then sent the false buyer's invoices with the arbitrarily increased prices and weights with the calves to Strauss Veal. He also reported these false prices and weights to Amos Good who reimbursed

Purchase Date 1962	Calf Tag No.	Purchased At	Original Price	Wrongfully Increased Price
6/14	Y868 1257	Best's Livestock Exchange	\$ 79.88	\$ 98.50
			78.40	93.60
7/12	H466 212W	Best's Livestock Exchange	145.00	168.00
			83.30	94.50
7/25	W601 W425 428 1541	Best's Livestock Exchange Best's Livestock Exchange Best's Livestock Exchange	68.60 62.40 58.31 67.20	79.05 85.00 73.00 77.50
8/2	1579 W856	Best's Livestock Exchange	58.83 53.90	82.15 76.50
8/9	W922 1003 1018 1023 1029	Best's Livestock Exchange Best's Livestock Exchange Best's Livestock Exchange	77.62 72.00 57.82 82.68 67.62	80.38 89.00 74.45 92.88 80.06
9/13	1736 Y53 Y394	Exchange Best's Livestock Exchange	64.32 73.50 60.76	77.50 84.15 75.00

14. On or about June 14, 1982, Schober purchased 3 calves at the Empire Livestock Marketing Cooperative, Adams, New York. On the same day, Schober transported the calves to the Northern New York stockyard, where respondents "invoiced" the calves through Northern New York records to Strauss Veal at weights and prices which were wrongfully increased over Schober's actual purchase weights and prices at the Empire Livestock Marketing Cooperative.

For the purpose of concealing the true nature of the transaction, the respondents caused to be prepared a fraudulent Northern New York account of sale and a buyer's invoice which purported to show that Schober consigned the three calves to Northern New York for sale on a commission basis through its auction ring, and repurchased them at the increased weights and prices. In fact, however, the calves were not consigned for sale, did not pass through Northern New York's auction ring, and were not repurchased by Schober on a competitive basis.

A copy of the fraudulent buyer's invoice was submitted to Strauss Veal by Schober. Copies of the fraudulent documents were retained in respondents' records. Schober reported the details of the purported purchase at Northern New York to Good, including the wrongfully increased weights and prices, and collected payment on the basis thereof.

15. On or about July 8, 1982, Schober purchased 3 calves at the Empire Livestock Marketing Cooperative, Adams, New York. On the same day, Schober transported the calves to the Northern New York stockyard, where the respondents "invoiced" the calves through Northern New York's records to Strauss Veal at weights and prices which were wrongfully increased over Schober's actual purchase weights and prices at the Empire Livestock Marketing Cooperative.

For the purpose of concealing the true nature of the transaction, the respondents caused to be prepared a fraudulent Northern New York account of sale and a buyer's invoice which purported to show that Wells consigned the three calves to Northern New York for sale on a commission basis through its auction ring, and that Schober purchased them at the increased weights and prices. In fact, however, the calves were not consigned for sale, did not pass through Northern New York's auction ring, and were not repurchased by Schober on a competitive basis.

A copy of the fraudulent buyer's invoice was submitted to Strauss Veal by Schober. Copies of the fraudulent documents were retained in respondents' records. Schober reported the details of the purported purchase at Northern New York to Good, including

the wrongfully increased weights and prices, and collected payment on the basis thereof.

Purchase of Own Livestock Without Disclosure

16. During 1981 and 1982, respondent Schober purchased livestock for Ezra H. Good, Inc. and Whitestown Packing Co. The representatives of these firms testified that Schober received a buying commission for his services and was expected to purchase all livestock for their accounts at the lowest prices available.

Frank Gerace, president of Whitestown Packing Company, testified that his firm had a policy which discouraged buyers from using their own livestock to fill orders but if, under unusual circumstances, this occurred, the buyer was required to disclose his prior ownership of the livestock to the firm. Mr. Gerace testified that Schober was aware of this company policy.

With respect to the Ezra H. Good firm, as set forth in findings 10 and 11, Amos Good's agreement with Schober did not permit Schober to buy livestock at one market, consign it to a second market, and then repurchase the livestock for Good.

17. On or about the dates and in the transactions specified below, Schober consigned his own livestock to auction markets and then repurchased the livestock from consignments for the accounts of his principals without disclosing to his principals his prior ownership of the livestock.

Date 1982	Market Livestock Consigned to by Schober	No. of own Head Purchased for Principal	Principal
7/8	Empire Livestock Marketing Cooperative	3	Strauss Veal
7/26	Northern New York Farmers' Marketing Cooperative, Inc.	2	Strauss Veal
7/31	Empire Livestock Marketing Cooperative	8	Whitestown Packing Co.
8/16	Empire Livestock Marketing Cooperative	3	Strauss Veal
8/23	Northern New York Farmers' Marketing Cooperative, Inc.	5	Strauss Veal

Accounts and Records

18. Respondent Schober, in connection with his business operations under the Act, failed to keep accounts, records and memoranda which fully and correctly disclosed all transactions involved in his business as a market agency and dealer under the Act in that respondent failed to keep and maintain (a) a general ledger of accounts showing assets, liabilities, income, expenses and net worth; (b) a dealer purchase and sales journal; and (c) a cash receipts and disbursements journal.

CONCLUSIONS

All contentions of the parties have been considered in the light of the record evidence. By reason of the aforesaid findings of fact, it is concluded that respondents have violated Sections 312(a) and 401 of the Act (7 U.S.C. 213(a), 221) and Section 201.44 of the regulation (9 CFR 201.44). The order proposed by complainant is appropriate in view of the record evidence and is issued herewith.

Increased Weights and Prices

As set forth in findings of fact 6 through 15, the evidence introduced at the oral hearing establishes that during the period alleged in the complaint, respondents knowingly and falsely increased the weights and prices of calves purchased on order for Ezra H. Good, Inc., in violation of the Act and applicable regulations.

Falsely increasing prices and/or weights on livestock purchased on commission for a principal has consistently been found to be in violation of section 312(a) of the Act (7 U.S.C. § 213(a) and section 201.44 of the regulations. *In re Hageman*, 42 A.D. 531, 541 (1983); *In re Hatcher*, 41 A.D. 662, 665-66 (1982); *In re Sidney Collier*, 38 A.D. 957 (1979); *In re Burrus*, 36 A.D. 1668, 1687 (1977), *aff'd per curiam*, 575 F.2d 1258 (CA 8, 1978); *In re Fairbank*, 27 A.D. 1371, 1378-82 (1968), *aff'd*, 429 F.2d 264 (CA 9, 1970), *cert denied*, 400 U.S. 943 (1970).

Similarly, issuing invoices showing such arbitrarily increased weights is a violation of section 401 of the Act (7 U.S.C. § 221). *In re Fairbank*, *supra* at 1379-1382; *In re George Saylor, Jr.*, 41 A.D. 2187; *In re Hageman*, *supra* at 541.

In light of the above, the documentary evidence and testimony leave no doubt that respondents falsely and unlawfully increased the weights and prices to their principal in violation of the Act and regulations.

Disclosure of Own Livestock

As set forth in findings 16 and 17, the record evidence establishes that respondent Schober purchased his own livestock to fill orders for his principals without disclosing his prior ownership in the livestock in violation of the Act and regulations.

In engaging in such an unfair and deceptive practice, Schober breached his fiduciary obligations to his principals. Buying one's own livestock through an auction to fill orders for a principal without full disclosure to the principal violates section 312(a) of the Act (7 U.S.C. § 213(a)) and section 201.44 of the regulations (9 CFR § 201.44) *In re Harry Vealey*, 39 A.D. 8, 13 (1979); *In re Livestock Marketing Development Co.*, 33 A.D. 784, 807-808 (1974).

Accounts and Records

The testimony of Mr. Marano, the investigator who reviewed the records, disclosed that at the time of the investigation, respondent Schober failed to keep accounts, records and memoranda which fully and correctly disclosed all transactions involved in his business. In particular, respondent failed to keep and maintain (a) a general ledger of accounts showing assets, liabilities, income, expenses and net worth; (b) a dealer purchase and sales journal; and (c) a cash receipts and disbursements journal.

The recordkeeping requirements of the Act are found in section 401 (7 U.S.C. 401). That section states in relevant part:

Every . . . stockyard owner, market agency, and dealer shall keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business, including the true ownership of such business by stockholding or otherwise. Whenever the Secretary finds that the accounts, records and memoranda of any such person do not fully and correctly disclose all transactions involved in his business, the Secretary may prescribe the form in which such accounts, records and memoranda shall be kept . . .

While the above-referenced journals are not listed by name in section 401, maintaining such separate accounting is necessary to facilitate compliance with the other sections of the Act and with the regulations. For example, a general ledger of accounts is necessary

to facilitate the determination of Schober's solvency under the Act, a requirement of all registrants. Similarly, the cash receipts and disbursements journal is necessary to carry out the requirements of section 201.44 of the regulations (9 CFR § 201.44, Accounting for Purchases).

Schober's failure to keep the journals and ledgers listed in the complaint prevents full disclosure of his business activities subject to the Act. Accordingly, respondent Schober is ordered, pursuant to section 401 of the Act, to maintain the specified records.

Willfulness of the Violation

1. Respondents argue (brief pp 2 and 3) that the practices they engaged in were proper and, therefore, not proscribed by the Act and regulations as alleged. In support of this view, they assert that the cited sections of the statute and regulations "are too vague to prohibit the conduct of respondent."

Respondents' argument is without merit. As the Judicial Officer noted in *In re William E. Hatcher*, 41 A.D. 662, 668:

Respondent argues on appeal that the Act and regulations are not specific enough to be understood by non-lawyers. But that argument is frivolous as applied to the violations in this case. It does not take a lawyer to know that it is a violation of the Act and regulations for an agent to falsely increase prices and weights on livestock purchased on commission and to use counterfeit invoices to conceal the real market from which the livestock was purchased.

Although the terms "unfair", "unjustly discriminatory" and "deceptive" used in section 312(a) of the Act are not defined in the statute, it has been held that the terms are not so vague or uncertain as to be an unconstitutional delegation of legislative authority. *Farmers' Livestock Commission Co. v. United States*, 54 F.2d 375, 378 (E.D. Ill. 1931); *O. V. Handy Brothers Co. v. Wallace*, 16 F.Supp. 662, 664-66 (E.D. Pa. 1936). The meaning of the terms must be construed from the facts of each case within the purposes of the Packers and Stockyards Act. *Capitol Packing Co. v. United States*, 359 F.2d 67, 76 (CA 10, 1965).

2. Respondents urge that they were the victims of discriminatory enforcement of the Act by the complainant (brief pp. 3-5) because the investigation which resulted in the issuance of the complaint was, in their view, instituted by Whitestown Packing Company president, Frank Gerace.

Congress expressly authorized the Secretary to initiate formal enforcement proceedings to redress violations of section 312(a) of

the Act upon the complaint of injured parties. (See § 312(b); 7 U.S.C. § 213(b)). Whether through the Agency's own initiative or as the result of a private complaint, when formal action is taken, it is the Secretary of Agriculture or his delegated agent who is the complaining party, not the private firm or firms allegedly injured by the respondent's actions. Moreover, because formal action is not initiated to compensate private parties for their financial losses, the amount of money involved is irrelevant to a determination of whether the Secretary of Agriculture will initiate an action.

The fact that the investigation of respondents' operations may have originally resulted from a complaint lodged by Frank Gerace of Whitestown Packing Company does not support respondents' argument of discriminatory enforcement. Respondents' claim that the resources of the government were used to enforce private grievances is also without merit.

3. The practices engaged in by respondents must be characterized as wilful as they were carefully planned and executed. Deciding that there was nothing wrong with making a few extra dollars profit on each calf billed to their principal, respondents knowingly and intentionally caused false accounts of sale and buyer's invoices to be fabricated to document their transactions. This evidences a calculated and carefully implemented intention to deceive and defraud.

With respect to Schober's failure to disclose his prior ownership of the livestock sold to his principals, the evidence makes it clear that Schober was aware of his obligations and deliberately failed to live up to them.

In view of the nature of the violations demonstrated in the record, the question of wilfulness requires little discussion. A violation is wilful if the respondent intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or if the respondent acts with careless disregard of the statutory requirements. *Butz v. Glover Livestock Commission Co.*, 411 U.S. 182, 185, 187 (1973); *Goodman v. Benson*, 286 F.2d 895, 900 (CA 7 1961); *In re Miller*, 33 A.D. 53, 83-87, *aff'd sub nom.*, *Miller v. Butz*, 498 F.2d 1088 (CA 5, 1974); *In re Lufkin Livestock Exchange, Inc.*, 27 A.D. 596, 609 (1968). The term "wilful" is also often used to denote a voluntary or knowing act as distinguished from one which is accidental.

SANCTION

Complainant requests that respondent Schober be (1) ordered to cease and desist from the practices discussed above, (2) ordered to comply with the recordkeeping requirements of the Act, (3) as-

essed a \$5,000.00 civil penalty and (4) suspended as a registrant for a period of six months. With respect to respondent Wells, the complainant recommends that in addition to the entry of an appropriate cease and desist order, she be prohibited from operating subject to the Act for a period of six months.

Respondents argue (brief pp. 6-8) that the sanction sought by complainant in this case is too severe and request only the imposition of a cease and desist order. In support of their recommendation, respondents rely upon factors which they claim complainant failed to consider in seeking the \$5,000 civil penalty against Mr. Schober, i.e., the gravity of the offense, the size of the business involved, and the effect of the penalty on the person's ability to continue in business.

The gravity of the offense need not include the matter of damages resulting from the offense, as respondents claim. Instead, the testimony of Reuben Johnson, at page 156, sums up the gravity of the circumstances here. Whether or not a profit is realized by the wrongful act, or the amount of the profit, is of little concern. Instead, "... in a case like this, it would be the fact that ... there was false weights, false prices, and the fact that full and complete disclosure was not rendered to the principal by the agent." Such practices destroy the integrity of the regulatory program. See: *In re George W. Saylor, Jr.*, P & S Docket No. 5753, September 20, 1985, slip opinion pp. 489-495.

Questions such as, the size of respondent Schober's business or the effect of the \$5,000 civil penalty on his ability to continue in business, appear to be answered at pages 318-319, 392, 401 of the record.

Respondent's business with Good amounted to almost \$2 million, or anywhere from \$40,000 to \$80,000 per week, whereby respondent Schober paid for the livestock from his own funds and thereafter was reimbursed by Good. Although his net income has dropped appreciably since 1982 when his cattle sales were in excess of a million dollars, Schober's farm income has not changed. In short, there is no showing in the record that respondent is unable to pay the \$5,000 penalty, or that the payment of such penalty will affect Schober's ability to continue in business. *In re Saylor, supra*, slip opinion pp. 525-526.

Complainant correctly argues, citing prior rulings, that the sanction sought is justified by the facts of this case and is consistent with past sanction policy (reply brief, pp. 4-5). Aside from prior precedents, falsely increasing the weights and prices of livestock purchased on a commission basis and failing to disclose prior own-

ship of livestock demonstrate clearly that the respondents deliberately and wilfully placed their interests ahead of their principals.

Accordingly, it is concluded that respondents have wilfully violated the Act and regulations as alleged in the complaint, and the following order is issued.

ORDER

Respondents Schober and Wells, their agents and employees, directly or through any corporate or other device, shall cease and desist from:

(1) Engaging in any act, practice or course of business for the purpose of obtaining money from the purchasers of livestock by false or deceptive pretenses;

(2) Entering into, continuing in, or cooperating in any agreement, arrangement, understanding, or course of business with any person for the purpose of aiding or assisting such person to obtain money from the purchasers of livestock by false or deceptive pretenses;

(3) Misrepresenting to their principals or to other purchasers of livestock from respondents (a) the manner in which such livestock was purchased or acquired by respondents, (b) the origin, or actual place of purchase of such livestock; (c) respondents' original purchase weights or original purchase prices for such livestock, or (d) the true nature of all charges made for their buying services;

(4) Preparing and issuing, or causing to be prepared and issued, in connection with the purchase or sale of livestock, accounts of sale, buyer invoices, billings, scale tickets or any other documents evidencing or prepared in connection with the purchase or sale of livestock, which show false, incorrect or misleading price or weight entries for such livestock, or which fail to disclose all facts necessary to show clearly and completely the true nature of each transaction;

(5) Collecting or aiding and assisting any person to collect from the purchasers of livestock on the basis of false, incorrect, or misleading invoices or accountings; and

(6) Using their own livestock to fill orders on a commission or agency basis without full disclosure of their interest in the livestock to their principal.

Respondent Schober shall keep and maintain accounts, records and memoranda which fully and correctly disclose the true nature of all transactions involved in his business subject to the Packers and Stockyards Act, including accounts, records and memoranda which show (1) the number of head of livestock bought and sold; (2) the date of purchase and sale; (3) the true and correct purchase and

sale prices for such livestock; (4) a complete and accurate cash receipts and disbursements journal; (5) the origin or place of purchase of such livestock; and (6) a general ledger of accounts showing assets, liabilities, income, expenses and net worth.

In accordance with section 312(b) of the Act (7 U.S.C. § 212(b)), respondent Schober is assessed a civil penalty in the amount of \$5,000.00.

Respondent Schober is suspended as a registrant under the Act for a period of six months.

Respondent Wells is prohibited for a period of six months from engaging in business and operating subject to the Act as a market agency, buying and selling livestock in commerce on a commission basis or furnishing stockyard services, or as a dealer, buying or selling livestock in commerce either for her own account or as the employee or agent of the vendor or purchaser.

The provisions of this order shall become final and effective 35 days after service of this order on respondents, unless appealed within 30 days after service. (9 CFR §§ 1.145(a) and 1.142(c)).

Copies of this decision and order shall be served upon the parties.

[The Decision and Order became final on February 27, 1986.—Ed.]

In re: FARMERS & RANCHERS LIVESTOCK AUCTION, INC., BILLY GENE DAVIS, MARY LAVONE DAVIS, JERRY MILLSAUGH, and RANDY DAVIS d/b/a CATTLEMAN'S COMMISSION COMPANY. P&S Docket No. 6483. Decided February 27, 1986.

Custodial account—Issuing insufficient funds checks—Failing to pay—Failing to remit net proceeds to consignors when due—Exchanging checks to create false balance in checking account—Purchasing livestock out of consignments for his own speculative account—Accounts and records—Suspended as a registrant.

Judicial Officer affirmed Chief Judge Campbell's decision suspending respondent Jerry Millsaugh as a registrant for 5 years and ordering him to cease and desist from various practices, including misusing a custodial account, issuing insufficient funds checks, failing to pay for livestock, failing to remit to consignors when due the net proceeds from the sale of consigned livestock, exchanging drafts or checks to create a false "float" or balance in a checking account, and purchasing livestock out of consignments for speculation, all of which were held to be unfair practices under the Act. Respondent's records failed to meet the requirements of the Act since purchases by respondent out of consignments were not identified as such to the consignors. Respondent Millsaugh is responsible for the corporate respondent's violations since he was one-third owner, vice president, and one of the three members of the board of directors of the corporate respondent. He is also responsible for violations of Cattleman's Commission Company, which was a continuation of the corporate business. Although respondent Millsaugh's registration is inactive, it may be us-

pendent. Complainant need only prevail by a preponderance of the evidence. Respondents' failure to testify gives rise to an inference that their testimony would have been adverse. A check-kiting scheme is a serious and flagrant violation of the Act because of its potential for harm. Severe sanction policy explained. That portion of the order providing that respondent Millsbaugh may be employed as an auctioneer after 1 year of his 5-year suspension is authorized by the Act since it is a relaxation of the sanction that would normally be in effect. Under the regulations, a suspended registrant cannot be employed by persons subject to the Act. The P&S Act adopts by reference the rule making authority of the Federal Trade Commission. The employment regulation has the force and effect of law. Auction market operators could be required to register as market agencies or dealers.

Eric Paul, for complainant.

Keith Rutledge, Batesville, AR., for respondent Millsbaugh only.

Decision by Donald A. Campbell, Judicial Officer

DECISION AND ORDER AS TO JERRY MILLSBAUGH

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*).^{*} An initial Decision and Order was filed on October 28, 1985, by Chief Administrative Law Judge John A. Campbell (ALJ) suspending respondent Jerry Millsbaugh as a registrant for 5 years and ordering him to cease and desist from various practices, including misusing a "Custodial Account for Shippers' Proceeds"; issuing insufficient funds checks; failing to pay for livestock; failing to remit to consignors when due the net proceeds from the sale of consigned livestock; exchanging drafts or checks to create a false "float" or balance in a checking account; and purchasing livestock out of consignment for speculation. The order also requires respondent Jerry Millsbaugh to keep complete and accurate records.

On December 3, 1985, respondent Jerry Millsbaugh appealed to the Judicial Officer, to whom final administrative authority decide the Department's cases subject to 5 U.S.C. §§ 556 and 5 has been delegated (7 CFR § 2.35).^{**} On December 19, 1985, the case was referred to the Judicial Officer for decision.

^{*} See generally Campbell, "The Packers and Stockyards Act Regulatory Program," in 1 Davidson, *Agricultural Law*, ch. 3 (1981 and Aug. 1985 Supp.) and Carter, "Packers and Stockyards Act," in 10 Harl, *Agricultural Law*, ch. 71 (1980).

^{**} The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), reprinted in 5 U.S.C. app. at 1058 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program) (December 1952-January 1971).

Based upon a careful consideration of the record, the ALJ's initial Decision and Order is adopted as the final Decision and Order in this case, with changes too minor to itemize. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*, hereafter referred to as the "Act"), instituted by a complaint filed on January 30, 1985, by the Administrator, Packers and Stockyards Administration. The complaint alleged that the financial condition of respondent Farmers & Ranchers Livestock Auction, Inc., and the financial condition of respondent Billy Gene Davis do not meet the requirements of the Act, and that the respondents have wilfully violated provisions of the Act and of the regulations promulgated thereunder.

Answers in the nature of general denials of all allegations, both jurisdictional and substantive, were duly filed. An oral hearing concerning all respondents was held in Little Rock, Arkansas, on July 30-31, and August 1, 1985. Complainant was represented by Eric Paul, Esquire, of the Office of the General Counsel, United States Department of Agriculture. Respondent Jerry Millsbaugh was represented by Keith Rutledge, Esquire, of the firm of Highsmith, Gregg, Hart, Farris & Rutledge of Batesville, Arkansas. Seven of the nine witnesses called by the complainant were cross-examined on behalf of respondent Jerry Millsbaugh by his counsel on July 30 and 31, 1985. Some 68 exhibits offered by complainant were received into evidence. No oral testimony was presented on behalf of any respondent nor were any exhibits offered on behalf of any respondent prior to the close of the hearing.

At the close of the hearing, the time was set for the filing of briefs in regard to respondent Millsbaugh. An initial decision and order was issued on September 13, 1985, pursuant to sections 1.139 and 1.141 (e) of the rules of practice (7 CFR § 1.139, 1.141(e)) with respect to the remaining respondents. Such decision and order requires: respondents Farmers & Ranchers Livestock Auction, Inc., Billy Gene Davis and Randy Davis, d/b/a Cattleman's Commission Co., to cease and desist from various practices in violation of the Act; to comply with record keeping provisions; suspends said respondents as registrants for a period of five years; and prohibits respondent Mary Lavone Davis from engaging in business as a

market agency or dealer under the Act for a period of five years together with cease and desist and record keeping provisions.

In this phase of the proceeding, complainant seeks a decision and order imposing corresponding cease and desist, record keeping, and suspension provisions upon respondent Jerry Millspaugh.

FINDINGS OF FACT

1. Farmers & Ranchers Livestock Auction, Inc. (hereafter sometimes referred to as the "corporate respondent"), is a corporation with its principal places of business in Charlotte and Mt. View, Arkansas, and its business mailing address is P. O. Box 156, Cord, Arkansas 72524.

2. The corporate respondent, at all times material herein, was:

(a) Engaged in the business of conducting and operating the Farmers & Ranchers Livestock Auction, Inc., stockyard at Charlotte, Arkansas, and the Farmers & Ranchers Livestock Auction, Inc., stockyard at Mt. View, Arkansas, stockyards posted under and subject to the provisions of the Act;

(b) Engaged in business as a market agency, selling livestock on a commission basis at the stockyards, and as a dealer, buying and selling livestock in commerce; and

(c) Registered with the Secretary of Agriculture as a market agency to sell livestock in commerce on a commission basis and as a dealer to buy and sell livestock in commerce.

3. Respondent, Jerry Millspaugh is, and at all times material herein was:

(a) Vice President and Auctioneer of the corporate respondent;

(b) Owner of a 33 1/3 percent interest in the corporate respondent's outstanding stock, and one of three members of the board of directors of the corporate respondent; and

(c) In combination with respondents Billy Gene Davis and Mary Lavone Davis, responsible for the direction, management and control of the operations of the corporate respondent.

4. Respondent Jerry Millspaugh, in combination with respondents Billy Gene Davis, Mary Lavone Davis and Randy Davis, is now and since August 7, 1984, has been:

(a) Engaged in the business of conducting and operating Randy Davis d/b/a Cattleman's Commission Company stockyard;

(b) Engaged in the business of a market agency selling livestock in commerce on a commission basis at that stockyard;

(c) Responsible for the direction, management and control of the operations of Randy Davis d/b/a Cattleman's Commission Company, and

(d) Respondent Jerry Millsbaugh is also registered individually as a market agency to sell livestock on a commission basis and as a dealer to buy and sell livestock in commerce. This registration is currently inactive.

5. In January 1984, Billy Gene Davis and Mary Lavone Davis filed a joint Chapter 11 petition in the United States Bankruptcy Court, Eastern District of Arkansas. In January 1984, the corporate respondent also filed Chapter 11 proceedings.

Farmers & Ranchers Livestock Auction, Inc.

6. The corporate respondent, under the direction, management and control of respondents Jerry Millsbaugh, Billy Gene Davis, and Mary Lavone Davis, in connection with its operations as a market agency, has failed to properly maintain and use its Custodial Account for Shippers' Proceeds, hereafter referred to as the Farmers & Ranchers custodial account, thereby endangering the faithful and prompt accounting therefor and payment of the portions thereof due the owners or consignors of livestock, in that:

(a) As of December 30, 1983, the corporate respondent had issued and outstanding custodial account checks in the amount of \$215,961.30, and had, to offset the outstanding checks, a balance in the custodial account of \$.78 and current proceeds receivable of \$28,075.86, resulting in a deficiency of \$187,874.66 in funds available to pay shippers' proceeds;

(b) As of January 13, 1984, the corporate respondent had issued and outstanding custodial account checks in the amount of \$357,484.21, and had, to offset the outstanding checks, a balance in the custodial account of \$16.02 and current proceeds receivable of \$167,335.75, resulting in a deficiency of \$190,132.44 in funds available to pay shippers' proceeds;

(c) As of January 31, 1984, the corporate respondent had issued and outstanding custodial account checks in the amount of \$335,007.47, and had, to offset the outstanding checks, a balance in the custodial account of \$42,416.08, resulting in a deficiency of \$292,590.79 in funds available to pay shippers' proceeds;

(d) As of February 16, 1984, the corporate respondent had issued and outstanding custodial account checks in the amount of \$301,480.55, and had, to offset the outstanding account checks, a balance in the custodial account of \$8,889.76, resulting in a deficiency of \$292,590.79 in funds available to pay shippers' proceeds;

(e) As of March 23, 1984, the corporate respondent had issued and outstanding custodial account checks in the amount of \$262,907.94 and an account overdraft of \$29,682.85, resulting in a

deficiency of \$292,590.79 in funds available to pay shippers' proceeds; and

(f) Such deficiencies were due, in part, to the misuse of funds received from the sale of consigned livestock as specified in Finding 7 below, and the failure to deposit in the custodial account within the time prescribed by the regulations an amount equal to the proceeds receivable due from the sale of consigned livestock.

7. During the period from at least January 6, 1984, through at least January 27, 1984, the corporate respondent, under the direction, management and control of respondents Jerry Millspaugh, Billy Gene Davis, and Mary Lavone Davis, in connection with its operations as a market agency, used funds received as proceeds from the sale of consigned livestock on a commission basis for purposes of its own and for purposes other than the payment of lawful marketing charges and the remittance of the net proceeds to the owners and consignors of livestock, in that funds received as proceeds from the sale of consigned livestock were regularly deposited to the corporate respondent's general account and used to repay a personal loan made to respondent Billy Gene Davis, to pay expenses of the market, and to finance livestock dealer expenses (CX 24-26; Tr. 130-144).

8. The corporate respondent, under the direction, management and control of respondents Jerry Millspaugh, Billy Gene Davis and Mary Lavone Davis, in connection with its operations as a market agency, on or about the dates and in the transactions set forth below, sold livestock on a commission basis and in purported payment of the net proceeds due the owners or consignors thereof, issued checks which were returned unpaid by the bank upon which they were drawn because the corporate respondent did not have sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented.

Date of Check (1984)	No. of Head	Check No.	Payee/Consignee	Amount of Check
1/4	1	13538	Ernest Grayson, Jr.	\$370.42
1/6	2	13702	Ora Mast	609.22
1/11	68	13815	Harold Mantooth	12,382.42
1/11	7	13801	Wayne Turner	1,085.77
1/11	2	13750	Charles Harris	590.39
1/11	4	13768	Tuft McSpadden	1,070.21
1/11	2	13898	William Archer	427.11
1/11	2	13717	Bobby Hsney	295.77
1/11	1	13775	Earl Litaker	403.28
1/11	9	13860	Ruth Kay Lytle	2,295.15
1/11	31	13808	Robert Walker	3,384.03

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Date of Check (1984)	No. of Head	Check No.	Payee/Consignee	Amount of Check
1/13	1	13528	Paul Hochstedler	294.67

9. In connection with the transactions set forth in Finding above, and in numerous additional transactions during the same period of time, the corporate respondent, under the direction, management and control of respondents Jerry Millspaugh, Billy Gene Davis and Mary Lavone Davis, sold consigned livestock on a commission basis and failed to remit to the owners and consignors such livestock, when due, the net proceeds resulting from such sales.

10. As of March 23, 1984, there remained unpaid to the owners and consignors of livestock net proceeds in the amount of \$218,079.54.

11. These consignors recovered \$100,160.93 upon the distribution of bonds maintained for the protection of consignors of livestock to Farmers & Ranchers Livestock Auction, Inc., pursuant to the bonding regulations promulgated by the Secretary of Agriculture.

12. The corporate respondent, under the direction, management and control of respondents Jerry Millspaugh, Billy Gene Davis and Mary Lavone Davis, in connection with its operations as a dealer, on or about the dates and in the transactions set forth below, purchased livestock and in purported payment therefor issued checks which were returned unpaid by the bank upon which they were drawn because the corporate respondent did not have sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented.

Date of Purchase	Seller	No. of Head	Date of Check	Check No.	Amount of Check
12/9/83	Merrell C. Akin Livak. Co.	102	12/12/83	4229	\$26,160.10
12/15/83	Merrell C. Akin Livak. Co.	99	12/20/83	4262	\$34,062.06

Date of Purchase	Seller	No. of Head	Date of Check	Check No.	Amount of Check
12/29/83				4262	\$24,062.66

13. The corporate respondent, under the direction, management and control of respondents Jerry Millsbaugh, Billy Gene Davis and Mary Lavone Davis, in connection with its operations as a dealer, on or about the dates and in the transactions specified in Finding 12 above and in the transactions specified below, purchased livestock in commerce and failed to pay, when due, the full purchase price of such livestock.

Date of Purchase	Seller	No. of Head	Unpaid Purchase Amount
12/30/83	Merrell C. Akin Livk. Co.	97	\$24,036.00
1/6/84	Merrill C. Akin Livk. Co.	105	\$24,243.88

14. As of August 16, 1984, there remained unpaid to the livestock seller in transactions set forth in Findings 12 and 13, a total of \$8,330.86.

15. Between August 26, 1983, and December 30, 1983, as more fully set forth in the schedule attached to this decision as Appendix A, Respondent Mary Lavone Davis drew twelve drafts totalling \$624,132.60 on Rex White Livestock Auction and deposited such drafts to the Farmers & Ranchers general and custodial accounts for immediate credit. On or about the dates on which these twelve drafts were drawn, respondent Mary Lavone Davis issued seventeen Farmers & Ranchers general account checks totalling \$563,819.15 payable to Rex White Livestock Auction. Respondent Jerry Millsbaugh issued two additional checks, drawn on his own personal checking account, totalling \$60,819.27, payable to Rex White Livestock Auction. Although sixteen of the nineteen checks given to Rex White Livestock Auction contained a notation to the effect that the check was for "cattle" or for a specific number of head, the Farmers & Ranchers checks and the two checks issued by respondent Jerry Millsbaugh were not issued in payment for live-

stock purchases, but rather, were issued to obtain the unauthorized use of credit by means of a float caused by a timed series of withdrawals and deposits, creating an illusion of sufficient funds in the Farmers & Ranchers general and custodial accounts (CX 32-50, 64, Tr. 204-256).

16. Numerous other drafts and checks drawn by respondent Mary Lavone Davis between Farmers & Ranchers and Rex White Livestock Auction during this period could not be verified as having been issued either in connection with actual purchases and sales of livestock or in connection with further check kiting or swapping because neither respondents Farmers & Ranchers Livestock Auction, Inc., Billy Gene Davis nor Rex White Livestock Auction maintained full and complete purchase and sales invoices and trucking records that could be reconciled with the dollar amount and number of head notations on additional Farmers & Ranchers checks.

17. On January 6, 1984, a Grace and Grace check in the amount of \$31,455.00 was issued by C.C. Grace payable to Farmers & Ranchers for "142 Cattle" and deposited for immediate credit in the Farmers & Ranchers general account with a deposit ticket indicating "purchase". On the same date, respondent Mary Lavone Davis issued a Farmers & Ranchers check payable to C.C. Grace in the amount of \$31,455.00 bearing the false notation "83 head".

18. On January 13, 1984, a Grace and Grace check in the amount of \$100,000.00 was issued by C.C. Grace payable to Farmers & Ranchers for "350 Cattle" and exchanged for two Farmers & Ranchers general account checks in the amount of \$50,889.29 and \$49,110.80, totalling \$100,000.00. Both Farmers & Ranchers checks contained the false notation "cattle".

19. No livestock was purchased or sold by respondents Farmers & Ranchers Livestock Auction, Inc., or Jerry Millsbaugh in connection with the exchanges or swapping of checks set forth in Findings 17 and 18 above, and the purpose of such exchange operations, commonly referred to as check kiting, was the generation of a float to finance the Farmers & Ranchers operations and/or hide the true balance in the Farmers & Ranchers general and custodial accounts.

20. On January 13, 1984, respondent Mary Lavone Davis drew a draft in the amount of \$32,841.52 on Bray Cattle Co., and deposited such draft to the Farmers & Ranchers general account. Although deposited with other instruments indicated as having been received in payment for "purchases", this draft was drawn with the prior agreement of Gordon Bray pending either: (1) the honoring of a Farmers & Ranchers check issued on January 13, 1984, in the amount of \$27,944.11 and a Jerry Millsbaugh check issued on Janu-

ary 13, 1984, in the amount of \$4,897.41, totalling \$32,841.52; or (2) the receipt of livestock to be purchased from the next scheduled auction sale. In either case, the exchange of draft and checks was made for the purpose of obtaining an unauthorized use of credit by means of a float and no actual purchase or sale of livestock occurred (CX 51, 54; 324-327, 350-357).

Cattleman's Commission Company

21. Respondent Jerry Millspaugh, together with the remaining individual respondents, in connection with the market agency operations being conducted under the registration Randy Davis d/b/a Cattleman's Commission Company, failed to properly maintain and use the Cattleman's Commission Company custodial account, thereby endangering the faithful and prompt accounting therefor and payment of the portions thereof due the owners or consignors of livestock, in that:

(a) As of October 31, 1984, respondent Jerry Millspaugh, in combination with the other respondents in this proceeding, had issued and outstanding Cattleman's Commission Company custodial account checks in the amount of \$272,124.42, and had, to offset the outstanding checks, a balance in the custodial account of \$5,443.97, deposits in transit of \$80,926.47 and current proceeds receivable of \$152,501.40, resulting in a deficiency of \$33,252.58 in funds available to pay shippers' proceeds;

(b) As of November 30, 1984, respondent Jerry Millspaugh, in combination with the other respondents in this proceeding, had issued and outstanding Cattleman's Commission Company custodial account checks in the amount of \$286,111.74, and had, to offset the outstanding checks, a balance in the custodial account of \$35,394.40 and current proceeds receivable of \$174,447.12, resulting in a deficiency of \$76,270.22 in funds available to pay shippers' proceeds;

(c) As of December 21, 1984, respondent Jerry Millspaugh, in combination with the other respondents in this proceeding, had issued and outstanding Cattleman's Commission Company custodial account checks in the amount of \$181,283.22, and had, to offset the outstanding checks, a balance in the custodial account of \$26,644.17, deposits in transit of \$4,068.09 and proceeds receivable of \$103,461.89, resulting in a deficiency of \$47,109.07 in funds available to pay shippers' proceeds;

(d) Such deficiencies were due, in part, to the failure to deposit in the custodial account before the close of the next business day an amount equal to the proceeds receivable from livestock purchases by respondents, by market employees, and by a dealer to

whom the market had extended credit and financed, one Gordon Bray.

22. Respondent Jerry Millsbaugh, in combination with the remaining individual respondents, in connection with the operations of Randy Davis d/b/a Cattleman's Commission Company during the period August 8, 1984, through January 9, 1985, purchased livestock which had been consigned for sale on a commission basis for the speculative account of Randy Davis d/b/a Cattleman's Commission Company (CX 58-62, Tr. 372-377, 412-427, 470-472).

23. Respondent Jerry Millsbaugh, in combination with the remaining individual respondents and in connection with the purchases of livestock consigned for sale on a commission basis in Finding 22 above, submitted accounts of sale to consignors which failed to disclose the true and correct names of the buyers and state the nature of the relationship existing between the market agency and the buyers (CX 60-62; Tr. 420-422, 425-427).

24. With respect to the financial condition and operations conducted under the name Cattleman's Commission Co., between January 1, 1985, and June 30, 1985, testimony by Regional Supervisor Jack Bellew and Auditor Kenneth Gordon of the Packers and Stockyards Administration's Memphis Regional Office (Tr. 436-444, 461-477), coupled with a Balance Sheet, Income Statement and Custodial Account analysis as of April 30, 1985 (Complainant's Exhibit 68) establish that respondent Jerry Millsbaugh, in combination with the other individual respondents, continued to operate the Cattleman's Commission Co. auction market in a manner that endangers the livestock marketing public in total disregard of the custodial account and fair trade practice requirements of the Act and regulations. A continued custodial account shortage (\$9,107.14 as of April 30, 1985) has been combined with a mounting operating loss (\$60,348.43 between January 1, 1985, and April 30, 1985) and an insolvency of \$80,367.44 (current liabilities less current assets as of April 30, 1985).

During this same period substantial purchases of consigned livestock, much of which was shipped to Amarillo, Texas, for resale on a speculative basis, have generated a company catch cattle income of \$11,329.61, a figure entirely incompatible with a legitimate market support operation. Moreover, as explained by Mr. Bellew, the revenues of the Cattleman's Commission Co. operation during this period were used to pay feed expenses of \$55,042.70. These feed expenditures go far beyond the amount of feed that could be used or stored at the stockyard, but are entirely appropriate for the feeding of cattle in the Bill Davis ranch operation (Tr. 464-466).

Lastly, an additional operating loss of some \$13,000 was incurred between April 30, 1985, and June 30, 1985 (Tr. 467).

25. When the registration of respondent Randy Davis was accepted pursuant to the submission of the documents that have been admitted as complainant's exhibits 6-8, respondent Jerry Millsbaugh was employed as auctioneer, the same position that he held in connection with the corporate respondent.

26. Respondent Jerry Millsbaugh advanced \$5,000.00 to respondent Randy Davis in order that a bond equivalent in the required amount of \$65,000.00 could be obtained and operations commenced under the trade name Cattleman's Commission Co.

27. Respondent Randy Davis was not in possession of knowledge respecting Cattleman's Commission Co. records and was observed to perform work of a type normally handled by "yard help" during the investigation conducted by Mr. Jack Bellow and Mr. Kenneth Gordon on August 28, 1984 (Tr. 453, 459-460). This investigation, and others conducted on subsequent dates by employees of complainant, establish that respondent Randy Davis, d/b/a Cattleman's Commission Co. was, in fact, a successor or sham circumvention of the Act and not a bona fide new entity.

28. Livestock purchases made from consignment during eight weekly sales held in November and December, 1984, totalled \$210,259.62, a figure equal to 14 per cent of the \$1,520,456.19 in livestock that had been consigned for sale at the Cattleman's Commission Co. stockyard (CX 58).

29. Recap sheets maintained in the Cattleman's Commission Co. records for these eight sales could not be reconciled to invoices showing "company" purchases. The recap figure for "Cattleman's Commission Co." purchases was far greater and the discrepancy was not explained until a market employee, the bookkeeper, revealed that purchases by "C&L" and "Long" were, in fact, company purchases (CX 59-62; Tr. 413-427).

Additional Finding

30. The check kiting established to exist between respondents Jerry Millsbaugh and Farmers & Ranchers Livestock Auction, Inc., on the one hand, and Rex White d/b/a White Auction Company on the other hand, included two checks drawn by respondent Jerry Millsbaugh in the amounts of \$30,747.33 on September 26, 1983, and \$30,741.87 on October 3, 1983. These were the checks that could be closely matched to corresponding drafts drawn on Rex White. A total of seven personal checks had been issued by respondent Jerry Millsbaugh payable to Rex White between September 7, 1983, and December 26, 1983 (CX 64). None of these could be

reliably tied to any purchase or sale of livestock shown in the corporate respondent's records or in the records of Rex White d/b/a White Auction Company. Since respondent Jerry Millspaugh failed to comply with an administrative subpoena, complainant's investigators could not conclusively establish during their investigation that no actual livestock purchases were involved. His personal involvement in this check-kiting scheme was extensive until curtailed by the refusal of his bank to accept for immediate credit after October 6, 1983, additional large checks drawn on out of town banks (CX 64, p.3).

CONCLUSIONS

All contentions of the parties have been considered in the light of the record evidence. By reason of the aforesaid findings of fact, it is concluded that respondent, Jerry Millspaugh, has violated the Act, as more fully explained below. The order proposed by complainant is appropriate in the light of the record evidence and is issued herewith.

Custodial Accounts, Failure to Maintain and Use Properly

Every market agency selling livestock on commission is required to establish and properly maintain a "Custodial Account for Shippers' Proceeds" (9 CFR § 201.42(b)). This is a trust account and the proceeds generated by the sale of consigned livestock are trust funds. *In re James L. Miller*, 38 A.D. 53, 61-62 (1974), *aff'd sub nom. Miller v. Butz*, 498 F.2d 1088 (5th Cir. 1974). The failure of a market agency to maintain its custodial account in accordance with the requirements of section 201.42 is a violation of sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)), as well as a violation of section 201.42 of the regulations. *In re Arab Stock Yard, Inc.*, 37 A.D. 293, 301-302, 310-311 (1978), *aff'd*, 582 F.2d 39 (5th Cir. 1978); *In re Sechrist Sales Company, Inc.*, 36 A.D. 665, 666, 671-675 (1977); *In re Hardy*, 33 A.D. 1383, 1398-1406 (1974).

Each of the custodial accounts that have been maintained for the protection of shippers who have consigned their livestock for sale at the Farmers & Ranchers Livestock Auction and Cattleman's Commission Co. stockyards have been shown to be in a state of substantial deficiency of a regularly recurring basis (Findings 6 and 21). The method used by respondent Jerry Millspaugh, in combination with the other individual respondents, to hide the shortage in the corporate respondent's custodial account was check-kiting or check swapping (Findings 15-19). The deficiencies found in the Cattleman's Commission Co. custodial account on October 31, 1984 (\$33,252.58), November 30, 1984 (\$76,270.22), and December 21, 1984

\$47,109.07), while somewhat smaller, were created by a failure to deposit in the custodial account before the close of the next business day, an amount equal to the proceeds receivable from livestock purchases made by the respondents, including purchases hidden by the use of false or misleading buyers names or notations, and a failure to make timely deposits for purchases made by a dealer to whom the market had extended credit and financed, one Gordon Bray (Findings 21, 22). This failure on the part of respondent Jerry Millsbaugh to maintain the Cattleman's Commission Co. custodial account in the required manner has continued and a deficiency continues to exist (Finding 24).

It must be concluded, therefore, that the course of conduct of respondent Jerry Millsbaugh with respect to the maintenance and use of the respective custodial accounts constitutes a wilful, deliberate and flagrant violation of sections 307 and 312(a) of the Act (7 U.S.C. §§ 208 and 213(a)), and of section 201.42 of the regulations.

Failure to Remit the Net Proceeds Due Owners and Consignors of Livestock

The corporate respondent, under the direction, management and control of respondents Jerry Millsbaugh, Billy Gene Davis and Mary Lavone Davis, sold livestock on commission at four auction sales and failed to remit, when due, the net proceeds resulting from such sales. As of March 23, 1984, net proceeds in the amount of \$218,079.54 remained unpaid (Finding No. 10). Respondent Jerry Millsbaugh acted in a fiduciary capacity and was obligated to remit the net proceeds of sale with a complete and accurate accounting before the close of the next business day following the sale of consigned livestock. *In re Arab Stock Yard, Inc.*, *supra*, 87 A.D. at 299, 301. This prompt payment of net proceeds is required by section 201.43(a) of the regulations (9 CFR § 201.43(a)). Any failure by any market agency to comply with this prompt remission requirement is an extremely serious violation of the Act.

Failures to remit net proceeds often follow failures to properly maintain custodial accounts in conformity with section 201.42 of the regulations (9 CFR § 201.42), when, as here, the market agency does not possess funds with which to make up custodial account shortages. The responsibility for properly maintaining the custodial account of respondent Farmers & Ranchers Livestock Auction, Inc., rests on its owners, officers and directors, including respondent Jerry Millsbaugh, who was an officer, director, and 1/3rd owner of this closely held corporation. Respondent Jerry Millsbaugh had to have actual knowledge that Billy Gene Davis has repeatedly failed to comply with these requirements, even to the extent of violating

a 1967 stipulation, a 1970 consent decision and a 1978 injunction. This pattern has continued after the January, 1984, failure of the corporate respondent in connection with a *de facto* successor, the Cattleman's Commission Co. operation (Finding No. 21).

It must be concluded that there has been a pattern of willful and deliberate failures to comply with the requirements of section 201.43(a) of the regulations and that such actions violate section 307 and 312(a) of the Act (7 U.S.C. §§ 208 and 213(a)).

Failures to Pay for Livestock Purchases

The corporate respondent, under the direction, management and control of respondents Jerry Millsbaugh, Billy Gene Davis and Mary Lavone Davis, made four purchases of livestock totalling \$98,498.64 as a dealer and failed to pay the livestock seller, Morrell C. Akin Livestock Co., for such purchases (Findings 12, 13). Checks drawn in purported payment for two of these purchases were dishonored upon presentation because sufficient funds were not on deposit and available (Finding 12). These failures to pay, when due, the full purchase price of livestock constitute an unfair and deceptive practice in willful violation of sections 312(a) and 409 of the Act (7 U.S.C. 213(a), 228b). *Lewis v. Butz*, 512 F.2d 681, 682-83 (8th Cir. 1975); *In re Mid-States Livestock, Inc.*, 37 A.D. 547, 561-62 (1977), *aff'd sub nom. Van Wyk v. Bergland*, 570 F.2d 701, 704-05 (8th Cir. 1978); *Bowman v. U.S.D.A.*, 368 F.2d 81, 85 (5th Cir. 1966). The unpaid livestock seller in this case was fortunate to recover all but \$8,330.96 of the total purchase amounts from dealer bonds required by the Secretary (Finding 14; CX 31, 31A). These actions, however, remain serious violations that call for the imposition of a substantial period of suspension.

The Issuance of NSF Checks and Check-kiting

Fourteen checks drawn on the corporate respondent's general and custodial accounts were dishonored upon presentation because of an absence of sufficient funds on deposit and available in these checking accounts (Findings 8, 12). Schedules of debts, and amendments to such schedules, which were filed by the corporate respondent in its Chapter 11 proceeding before the United States Bankruptcy Court for the Eastern District of Arkansas (CX 17) admit the issuance of many additional NSF checks that were eventually paid because they had been held too long by the corporate respondent's bank. Respondent Mary Lavone Davis drew these checks (CX 31) knowing that they could be honored upon presentation only by reason of the float produced by an extensive check-kiting or check swapping scheme (Findings 15-20). Respondent

Jerry Millsbaugh actively participated in this check swapping scheme until his bank advised him of no further immediate credit on checks deposited to his personal checking account (Finding 30).

It is well established that the issuance of checks in connection with transactions under the Act which are dishonored because of insufficient funds on deposit and available in the account on which such checks are drawn is an unfair and deceptive practice that violates section 312(a) of the Act (7 U.S.C. § 213(a)). *In re Edwards*, 37 A.D. 1880, 1887 (1978); *In re Bryan*, 36 A.D. 37, 42 (1977). By issuance of the two NSF checks made payable to Merrell C. Akin, the corporate respondent and respondent Jerry Millsbaugh have also willfully violated section 409 of the Act (7 U.S.C. § 228b).

The generation of a false "float" in the corporate respondent's general and custodial bank account by the deposit of checks or drafts for immediate credit coupled with the concurrent issuance of checks in identical or similar amounts for exchange or swapping is clearly an unfair and deceptive practice in violation of section 312(a) of the Act (7 U.S.C. § 213(a)).¹ Even the misuse of a "float" generated without resort to check-kiting has been condemned in numerous cases. *In re Roseth*, 39 A.D. 28, 36 (1980), *aff'd per curiam* (unpublished), 636 F.2d 1224 (8th Cir. 1980); *In re Hardy*, 33 A.D. 1883, 1898-1406 (1974); *Bowman v. U.S.D.A., supra; Daniels v. United States*, 242 F.2d 39, 41-42 (7th Cir. 1975), *cert. denied*, 354 U.S. 939.

Incomplete Records and Records Containing False and Deceptive Entries

The records maintained by the corporate respondent fail to meet the requirement of section 401 of the Act (7 U.S.C. § 221), which provides, *inter alia*, that

any . . . market agency, and dealer shall keep such accounts, records and memoranda as fully and correctly disclose all transactions involved in his business . . .

Drafts drawn on White Auction Company between August 26, 1983, and January 5, 1984, totalled \$2,719,477.48. Checks issued payable to Rex White or White Auction Company totalled \$2,243,147.35 (CX 64). Only a handful of these transactions could be tied to the legitimate purchase or sale of livestock or to an existing check-kiting arrangement because complete dealer invoices and related records were not available. At the hearing, complainant was

¹ *In re Blackfoot Livestock Commission Co., Administrative Law Judge's Decision* PS Docket No. 6107, Aug. 22, 1985, on appeal to Judicial Officer.

able to link over \$600,000 in drafts to a corresponding total of checks by reason of identical or virtually identical amounts and dates (Finding 15; Appendix A of this decision). False notations were entered on Farmers & Ranchers checks involved in this check swapping, and on additional checks issued to a number of other livestock dealers, to the effect that such checks were for "cattle" or a specific number of head, for example, "83 hd" (Findings 17, 18). Similar false notations were entered on personal checks issued by respondent Jerry Millspaugh.

Similarly, the accountings of sale provided to livestock consignors in connection with consignments to the Cattleman's Commission Co. sale were shown to misrepresent the name of the buyer. When livestock purchased by the market agency were not shown as "Co." (the designation noted on the invoices for sale barn purchases), designations were used which were not identified to the consignors as having any relation to the respondent market agency (Finding 29; CX 59-62). There was unrefuted testimony to the effect that this practice had also prevailed at the sales conducted by the corporate respondent (Tr. 400).

The issuance of invoices that fail to disclose the true and correct name of the buyer is an unfair and deceptive practice that violates section 312(a) of the Act (7 U.S.C. § 213(a)), and the failure to maintain complete records warrants the entry of a record keeping order pursuant to section 401 of the Act (7 U.S.C. § 222).

Purchasing Out of Consignments

It is well established that market agencies selling on commission are fiduciaries that engage in an unfair and deceptive practice, in violation of section 201.56 of the regulations and section 312(a) of the Act, when they buy livestock out of consignments for speculation and when they fail to fully disclose purchases made to support the market. See 9 CFR § 201.59(c), (e); *In re Loretz*, 36 A.D. 1087 (1977); *In re Hardy*, 33 A.D. 1383 (1974); *In re Lufkin Livestock Exchange*, 27 A.D. 596, 610 (1968).

The high volume of purchases out of consignments by respondents in Cattleman's Commission Co. sales, and the profits generated from such purchases, show that this unfair practice has been a basic element of the business conducted, just as it was previously with respect to the corporate respondent's operations (CX 58; Tr. 373-377).

It must be concluded, as complainant contends, that respondent Jerry Millspaugh had full knowledge that a high volume of livestock was being purchased for speculative purposes on a regular basis in violation of the fiduciary obligation owed to livestock con-

signors under the Act. Mr. Kenneth Gordon, an auditor who is familiar with the sale of livestock at auction markets, testified as follows:

- Q. And how would you describe these transactions?
- A. My description of them, based on the numbers of percentages, even though the classification of market support or catch cattle was used, the volume would lend itself to be buying out of consignment for speculative purposes, in other words, buying and shipping and then expecting it to sell at a profit.
- Q. Now is there any way that this could have been done without Jerry Millspaugh personally knowing that these purchases were being made by the company?
- A. No, they were not. Him being the auctioneer, he indicated the sale of the livestock to the individual that purchased them when he accepted the final bid on the animal, the buyer was disclosed at that time, so Mr. Millspaugh had to know who the purchaser was. (Tr. 376)

The true extent of such speculative purchases was evident to respondent Jerry Millspaugh, but hidden from consignors by the use of fictitious names such as "Long" and initials and numbers that were not identified in the accountings prepared as company buying symbols (Findings 28, 29; Tr. 385-387, 392-393, 397-400).

Mr. Jack Bellew, complainant's Regional Supervisor, a CPA with 12 years experience in the observation of auction sales and the investigation of auction market operations, also testified that respondent Jerry Millspaugh would have had to be aware of market purchases exceeding five or ten percent of total consignment volume and was an integral part of the operation (Tr. 470-471).

Responsibility of Respondent Jerry Millspaugh For Violations By Farmers & Ranchers Livestock Auction, Inc., and Cattleman's Commission Co.

The position taken by respondent Jerry Millspaugh throughout the portion of the oral hearing he attended, in person and by counsel, is that his involvement in the direction, management and control of the operations of Farmers & Ranchers Livestock Auction, Inc., was strictly limited to a performance of the duties of auctioneer.

Respondent argues at page 15 of his brief:

Respondent Jerry Millsbaugh was an owner and director and Vice-President of the Corporate Respondent. His sole function was that of auctioneer. He had no direct supervisory control, management, direction, or control over the custodial accounts, general accounts, check writing, or any other management responsibilities for the Corporate Respondent. The actions taken by Jerry Millsbaugh throughout his employment and connection with the other Respondents herein clearly show that Jerry Millsbaugh has not in any way violated the Rules and Regulations to the Packers & Stockyards Act.

The record shows, however, that respondent Jerry Millsbaugh either actively participated in violations which occurred in the course of the Farmers & Ranchers and Cattleman's Commission Co. operations, or knowingly permitted respondents Billy Gene Davis and Mary Davis to conduct the daily operations of the corporate respondent and the Randy Davis d/b/a Cattleman's Commission Co. operation in violation of the Act and regulations. In either case, he must be held fully responsible for such violations in order that the remedial purposes of the Act can be achieved.

Cease and desist orders have been repeatedly made applicable to respondents who are owner/officers of closely held family corporations despite lack of active personal participation in the practices found to violate the Act. In *In re MCM Livestock*, 39 A.D. 893, 991 (1980), the Department's Judicial Officer made such an order applicable to respondent McAninch, even though he was an absentee owner/officer who lived in Indianapolis, Indiana, and only visited the Whiteville, North Carolina, auction market facility on rare occasions and generally took no active part in the day-to-day operation of MCM. The Judicial Officer stated:

This is not to punish respondent McAninch, but to deter him and others similarly situated from permitting such violations to occur in the future. If the president of a closely held family corporation, whose wife owns two-thirds of the firm, could avoid a cease and desist order when serious violations are committed by the corporation merely by delegating his responsibility to someone else, the remedial purposes of the Act would not be achieved.

Respondent Jerry Millsbaugh's involvement was much more extensive. First, he wrote checks containing false entries as to the number of head of livestock purportedly being paid for that were issued solely in connection with a check-kiting scheme (Findings 15-20). Second, he sold livestock as auctioneer in transactions

where he could not avoid knowing that the livestock were being purchased without disclosure that these were direct or indirect company purchases for speculative purposes. This occurred on a regular basis with respect to both Farmers & Ranchers and Cattleman's Commission Company operations (Tr. 376-400). He advanced funds to respondent Randy Davis to permit a continuation of the same practices that he knew had occurred in the corporate respondent's operation (CX 12-14; Tr. 82-84). He was aware that the respective custodial accounts were not being properly maintained and that a dealer, Gordon Bray, was being allowed to pay for livestock at the following weekly sale without a prompt reimbursement of the custodial account (CX 63, Tr. 442). Lastly, he was present when records were sought by complainant's investigators during both the current and prior investigations and must have been well aware that the corporate respondent's records were being kept during 1983 and 1984 in such a manner as to fail to fully and correctly disclose all transactions involved in its business (Tr. 444, 450). He failed to produce records to support his issuance of personal checks used in a check-kiting scheme (CX 82, 64; Tr. 191, 203, 448). He was, as noted by witness Jack Bellew, an integral part of the entire operation (Tr. 470-471). Under these circumstances, a suspension order as well as a cease and desist and record keeping order is required.

SANCTION

Respondent Jerry Millsbaugh was initially registered as an individual, selling livestock on a commission basis under the name Farmers & Ranchers Livestock Auction at Mt. View, Arkansas, on May 5, 1975 (CX 1, p.9). This registration was amended April 30, 1976, to add buying and selling on commission at the Montgomery Livestock Auction, Searcy, Arkansas, and a dealer operation (CX 1, pp. 7-8). On February 25, 1977, a corporate registration was issued to Farmers & Ranchers Livestock Auction, Inc., and the Mt. View operation was continued under this registration. Subsequently, the Searcy sale was replaced with a sale at Charlotte, Arkansas, after construction of a new sale barn (Tr. 32). The individual registration of respondent Millsbaugh became inactive with the termination of bond coverage on March 27, 1977 (CX 1, p. 8). It is complainant's position that respondent Jerry Millsbaugh remains a registrant, since it is not the policy of complainant to terminate registrations, but only to inactivate them (Tr. 254-255). Since he is an inactive registrant, he may be suspended as a registrant.

Complainant presented sanction testimony at the close of the oral hearing from Mr. Jack Bellew, and from Mr. Harold W. Davis,

Chief of the complainant's Livestock Marketing Division reviewed the difficulties being encountered by his obtaining proper adherence to the Act by other registrants of the Act by respondent Billy Gene Davis through auction being conducted under the name Randy Davis d/b/a man's Commission Co. Mr. Davis, the individual delegated responsibility by complainant to determine what sanction be sought in all cases involving market agencies and dealers that a five-year suspension and standard cease and desist provisions should be made applicable to each registrant, and like period of prohibition and cease and desist provisions imposed upon the single non-registrant, respondent Mary Davis. He qualified this agency recommendation by indicating a provision allowing the employment of respondent Jerry Millsaugh as an auctioneer only by other registrants after the expiration of the first year of a five-year suspension would be applied to complainant. He explained that respondent Jerry Millsaugh should not be allowed employment involving the buying and selling of livestock outside the auctioneer function or the exercise of management responsibilities or control of operations requiring a license.

The requested five-year suspension of respondent Jerry Millsaugh appears reasonable in the light of the record evidence. Respondent Jerry Millsaugh has been shown to be intimately involved in numerous violations which occurred with respect to the operations conducted under the name Farmers & Ranchers Livestock Auction, Inc., and under the name Randy Davis Cattleman's Commission Co.

It is evident that respondent Jerry Millsaugh has wilfully participated in the violations that have occurred after the registration of Randy Davis. To insure that Jerry Millsaugh does not return to the front during the five-year period when complainant has sought to have respondents Billy Gene Davis and Mary Lavone Davis from operating as market agencies and dealers in the same manner as respondent Randy Davis has done since August 8, 1984, a suspension of the same duration must be imposed upon him. Recognition that he was not responsible for the earlier violations or to a prior order of the Secretary is provided by a provision allowing his employment by other registrants after one year exclusion as an auctioneer. The broad authority of the Secretary to impose a sanction on one respondent designed to insure that a sanction imposed on a related respondent is not circumvented has been

by the United States Court of Appeals for the Seventh Circuit in *Mattes v. United States*, 721 F.2d 1125 (1983).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent contends on appeal that the ALJ's findings are not adequately supported by the record, but the record abundantly supports the ALJ's findings and conclusions. In fact, the proof here far surpasses the preponderance of the evidence, which is all that is required.²

Respondent Jerry Millsaugh's argument as to the evidence is primarily based on his contention that the evidence does not prove that he was personally responsible for the violations. But the evidence showing that respondent Jerry Millsaugh was vice president and one of the three directors of the corporate respondent, and that he owned one-third of the corporate respondent's outstanding stock, is sufficient to show that he was responsible for the corporate respondent's violations. The record further shows that Randy Davis d/b/a Cattleman's Commission Company was merely a continuation of the corporate respondent.

Furthermore, neither respondent Jerry Millsaugh nor any of the other respondents testified in this proceeding, notwithstanding the fact that respondent Jerry Millsaugh was present during most of the hearing. Under the settled principle that has been followed in many proceedings before this Department,³ and which has also

² See *Herman & MacLenn v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steedman v. SEC*, 450 U.S. 91, 98-104 (1981); *In re Rowland*, 40 Agric. Dec. 1384, 1941 n.5 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Gold Bell-1&S Jersey Farms, Inc.*, 37 Agric. Dec. 1335, 1346 (1978), *aff'd*, No. 78-8134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 170 (3d Cir. 1980).

³ E.g., *In re Grady*, 45 Agric. Dec. ____ (Jan. 31, 1986); *In re Haring Meats and Delicatessen, Inc.*, 44 Agric. Dec. ____ (Oct. 17, 1985); *In re Saylor*, 44 Agric. Dec. ____ (Sept. 20, 1985); *In re Petty*, 43 Agric. Dec. ____ (Oct. 31, 1984), appeal docketed, No. 3-84-2800-R (N.D. Tex. Dec. 19, 1984); *In re Jarosz Produce Farms, Inc.*, 42 Agric. Dec. ____ (Oct. 5, 1983); *In re Farran*, 42 Agric. Dec. ____ (Sept. 21, 1982), *aff'd in part and rev'd in part*, No. 83-2548 (9th Cir. Apr. 24, 1985) (merits affirmed; suspension reversed); *In re Mattes Livestock Auction Market, Inc.*, 42 Agric. Dec. 81, 101-02, *aff'd*, 721 F.2d 1125, 1130 (7th Cir. 1983); *In re Stamper*, 42 Agric. Dec. 20, 32 n.4 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984); *In re De Graaf Dairies, Inc.*, 41 Agric. Dec. 388, 402-03 (1982), *aff'd*, No. 82-1157 (D.N.J. Jan. 24, 1983), *aff'd mem.*, 735 F.2d 657 (3d Cir. 1983); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1507 (1981), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *name pro tunc*, *aff'd* (unpublished), 742 F.2d 1462 (9th Cir. 1984); *In re Great Western Pucking Co.*, 39 Agric. Dec. 1358, 1363-64 (1980), *aff'd*, No. CV 81-0534 (C.D. Cal. Sept. 30, 1981); *In re Purvis*, 38 Agric. Dec. 1271, 1276-77 (1979); *In re Wilcox*, 37

been followed in many judicial proceedings,⁴ I infer that Jerry Millsbaugh's testimony would have been adverse to his position here. "It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other to have contradicted." Lord Mansfield, in *Blatch v. Archer*, Cowp. 66, quoted with approval in Wigmore, *Evidence* (3d ed. 1940), § 285.

In addition, the record shows that respondent Jerry Millsbaugh personally participated in the check-kiting scheme. For example, on September 26, 1983, respondent corporation drew a draft on Rex White for \$43,331.92. On the same date, September 26, 1983, the corporate respondent issued a check to Rex White for \$12,585, and respondent Jerry Millsbaugh issued a check from his personal account to Rex White for \$30,747.33. The total amount of the two checks issued by the corporate respondent and Jerry Millsbaugh to Rex White on September 26, 1983, is \$43,332.33, i.e., a difference of only 41¢ between the draft drawn by the corporate respondent on Rex White on September 26, 1983, and the two checks issued by the corporate respondent and Jerry Millsbaugh on the same day to Rex White.

Similarly, on October 4, 1983, the corporate respondent drew a draft on Rex White in the amount of \$56,811. On the same day, the

Agric. Dec. 1659, 1666-67 (1978); *In re Central Ark. Auction Sale, Inc.*, 37 *Agric. Dec.* 570, 586-87 (1977), *aff'd* 570 F.2d 724 (8th Cir.) (2-1 decision), cert. denied, 435 U.S. 907 (1978); *In re Arab Stock Yard, Inc.*, 37 *Agric. Dec.* 293, 305 *aff'd* *mem.*, 552 F.2d 38 (5th Cir. 1978); *In re Burrus*, 35 *Agric. Dec.* 1668, 1686-87 (1977), *aff'd per curiam*, 575 F.2d 1258 (8th Cir. 1978); *In re Daifong Packing Co.*, 39 *Agric. Dec.* 607, 637-38 (1977), *aff'd*, 618 F.2d 1329 (9th Cir.) (2-1 decision), cert. denied, 449 U.S. 1061 (1980); *In re Lorets*, 35 *Agric. Dec.* 1687, 1106-01 (1977); *In re Livestock Marketers, Inc.*, 51 *Agric. Dec.* 1552, 1558 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), cert. denied, 435 U.S. 908 (1978); *In re Whaley*, 35 *Agric. Dec.* 1519, 1522 (1976); *In re Circo*, 34 *Agric. Dec.* 1917, 1929-30 (1975); *In re Worsley*, 33 *Agric. Dec.* 1547, 1572 (1974); *In re Treutou Livestock, Inc.*, 39 *Agric. Dec.* 490, 514 (1974), *aff'd per curiam* (unpublished), 516 F.2d 966 (4th Cir. 1975); *In re Speight*, 33 *Agric. Dec.* 303-01 (1974); *In re Sy R. Gailor & Co.*, 31 *Agric. Dec.* 474, 499 (1972).

⁴ 2 Wigmore, *Evidence* §§ 285-91 (3d ed. 1940); *United States v. Di RE*, 332 U.S. 581, 598 (1948); *Interstate Circuit v. United States*, 308 U.S. 208, 225-27 (1939); *Kirk v. Tallmadge*, 160 U.S. 379, 383 (1895); *Karacas Compania, Etc. v. Atlantic Export Corporation*, 588 F.2d 1, 9-10 (2d Cir. 1978); *International Union v. NLRB*, 466 F.2d 1357, 1362-70 (D.C. Cir. 1971); *Milbank Mut. Ins. Co. v. Wentz*, 352 F.2d 502, 507 (5th Cir. 1965); *Crembling v. Pittsburgh & Lake Erie R.R. Co.*, 327 F.2d 142, 148-49 (3d Cir. 1963); *Huffman v. CIR*, 298 F.2d 784, 788 (3d Cir. 1962); *Illinois Central R.R. Co. v. Staples*, 272 F.2d 829, 834-35 (8th Cir. 1959); *Neidhoefer v. Automobile Ins. Co. of Hartford, Conn.*, 182 F.2d 269, 270-71 (7th Cir. 1950); *Rowles v. Lenin*, 151 F.2d 415, 619 (7th Cir.), cert. denied, 327 U.S. 805 (1946); *Longini Shoe Mfg. Co. v. Ralston*, 191 F.2d 253, 256-57 (C.C. P.A. 1939); *NLRB v. Remington Rand, Inc.*, 94 F.2d 882, 81-68 (2d Cir.), cert. denied, 304 U.S. 576 (1938).

porate respondent issued a check to Rex White for \$26,070, and the preceding day, October 3, 1983, respondent Jerry Millsbaugh issued a check from his personal account to Rex White for \$741.87. The two checks to Rex White totalled \$56,811.87, i.e., \$1,874 more than the draft drawn by the corporate respondent on Rex White.

The absence of any testimony by respondent Jerry Millsbaugh or any of the other respondents, this evidence, together with the evidence relating to the check-kiting scheme, gives rise to the inference that Jerry Millsbaugh was personally writing checks on his own checking account as part of the check-kiting scheme.

It should be noted that a check-kiting scheme is a serious and blatant violation of the Act not because of the actual loss that may have occurred as a result of the arrangement, but, rather, because a check-kiting arrangement of the size involved here over an extended period of time has the potential for great harm.⁵ Such check-kiting schemes are very easy for livestock firms to engage in and go undetected by banking officials. Accordingly, severe sanctions must be imposed where any respondent engages in a check-kiting scheme in connection with its livestock activities subject to the Act.

It is the policy of this Department to impose severe sanctions for violations of any of the regulatory programs administered by the Department to serve as an effective deterrent not only to respondents, but also to other potential violators. This policy has been followed in all of the Department's disciplinary proceedings in recent years.

The basis for the Department's severe sanction policy is set forth at length in numerous decisions, e.g., *In re Worsley*, 33 Agric. 547, 1556-71 (1974),⁶ which is set forth as Appendix B to this issue.⁷

For example, in *In re Blackfoot Livestock Commission Co.*, P&S Docket No. 1088, presently before the Judicial Officer, when a check-kiting scheme engaged in by a livestock firm was suddenly ended by one of the firms, the other firm's assets left holding three dishonored drafts totalling almost \$960,000 (for which it was only given credit). In addition, livestock sellers lost nearly \$200,000.

The Department's severe sanction policy did not originate with *Worsley*, but, as mentioned briefly in the first decision issued by the present Judicial Officer, *Henner*, 30 Agric. Dec. 1151, 1268-64 (1971), and was further developed in its other decisions before it was finalized in *In re Miller*, 33 Agric. Dec. 53, 174, *aff'd per curiam*, 408 P.2d 1088 (8th Cir. 1974).

The sanctions issued pursuant to the Department's severe sanction policy included, e.g., in *In re Collier*, 38 Agric. Dec. 957, 971-72 (1970), *aff'd per*

Continued

In view of the serious, flagrant and repeated violations by the corporate respondent, for which respondent Jerry Millsaugh is responsible, the 5-year suspension imposed by the ALJ as to respondent Jerry Millsaugh is appropriate, irrespective of the additional violations by Randy Davis d/b/a Cattleman's Commission Company, and irrespective of the desirability of preventing Billy Gene Davis and Mary Lavone Davis from continuing operations during their 5-year suspension period. Nonetheless, the ALJ properly considered the violations by Randy Davis d/b/a Cattleman's Commission Company (since it was merely a continuation of the corporate respondent's business), and the desirability of having the sanction as to respondent Jerry Millsaugh coincide with the 5-year suspensions applicable to respondents Billy Gene Davis and Mary Lavone Davis (see *In re Farmers & Ranchers Livestock Auction, Inc.*, 44 Agric. Dec. ____ (Sept. 13, 1985) (decision as to the respondents other than Jerry Millsaugh)).

Respondent Jerry Millsaugh challenges that part of the order relating to a restriction on his employment, i.e., providing that his suspension "shall not constitute a bar on his employment by any other registrant under the Act in the capacity of a salaried or hourly wage auctioneer after the completion of the first year of his five-year period of suspension." However, that provision is actually a relaxation of the sanction that would normally be in effect. The regulations prohibit a stockyard owner, packer, market agency, or dealer from employing any suspended registrant to perform activities in connection with livestock transactions subject to the Act

curiam (unpublished), 624 F.2d 190 (5th Cir. 1980); *In re Gold Bell-IdS Jersey Farms, Inc.*, 37 Agric. Dec. 1335, 1342-63 (1973), *aff'd*, No. 78-3124 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (2d Cir. 1980); *In re Muehlenhafer*, 37 Agric. Dec. 313, 330-32, 337-52, *aff'd mem.*, 610 F.2d 340 (8th Cir. 1978); *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547, 549-51 (1977), *aff'd sub nom. Van Wyk v. Berglund*, 570 F.2d 701 (8th Cir. 1978); *In re Cordale Livestock Co.*, 36 Agric. Dec. 1114, 1133-34 (1977), *aff'd per curiam* (unpublished), 675 F.2d 879 (5th Cir. 1978); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1562, 1561 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 908 (1978); *In re Cataunero*, 35 Agric. Dec. 26, 31-32 (1970), *aff'd*, No. 76-1612 (5th Cir. Mar. 2, 1977), *printed in* 36 Agric. Dec. 467; *In re Maine Potato Growers Inc.*, 34 Agric. Dec. 773, 796, 801 (1975), *aff'd*, 540 F.2d 618 (1st Cir. 1975); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 750, 762 (1975), *aff'd*, 540 F.2d 830 (D.C. Cir.), *cert. denied*, 434 U.S. 920 (1977); *In re Southwest Produce, Inc.*, 34 Agric. Dec. 140, 171, 173, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re J. Acevedo & Sons*, 34 Agric. Dec. 130, 133, 145-90, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re Marcus Troglash Co.*, 33 Agric. Dec. 1884, 1913-14 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975); *In re Traxton Livestock, Inc.*, 33 Agric. Dec. 499, 515, 538-50 (1974), *aff'd per curiam* (unpublished), 510 F.2d 968 (4th Cir. 1975); *In re Miller*, 33 Agric. Dec. 53, 64-80, *aff'd per curiam*, 498 F.2d 1088, 1089 (5th Cir. 1974).

during a suspension period. Specifically, the regulations provide (9 CFR § 201.81):

§ 201.81. *Suspended registrants.*

No stockyard owner, packer, market agency, or dealer shall employ any person who has been suspended as a registrant to perform activities in connection with livestock transactions subject to the jurisdiction of the Secretary under the Act during the period of such suspension: *Provided*, That the provisions of this section shall not be construed to prohibit the employment of any person who has been suspended as a registrant until such time as the person demonstrates solvency or obtains the bond required under the Act and regulations. No such person shall be employed, however, until after the expiration of any specified period of suspension contained in the order of suspension.⁸

Authority to issue regulations under the Packers and Stockyards Act is contained in § 402 of the Act (7 U.S.C. § 222), which adopts by reference the authority of the Federal Trade Commission to issue regulations (15 U.S.C. § 46(g)), and in § 407 of the Act (7 U.S.C. § 228(a)). Many of the Packers and Stockyards Act regulations are merely advisory, but others have the force and effect of law.⁹ The regulation just quoted is obviously one of the regulations having the force and effect of law. The regulation is necessary to carry out the provisions of the Act, and is within the statutory authority of the Secretary (see, e.g., 7 U.S.C. §§ 192, 208, 213).

In addition, the regulation is necessary to prevent evasion of suspension orders issued under 7 U.S.C. § 204. If a suspended registrant could be employed by a stockyard owner, packer, market agency, or dealer to perform activities subject to the Act during the period of a suspension, the suspension power would be an ineffective regulatory tool.

⁸The current provisions were added in 1984 (39 Fed. Reg. 27,371, 27,374-75 (1984)), but similar provisions were previously in effect (19 Fed. Reg. 4522, 4522 (1954); 24 Fed. Reg. 3182, 3184 (1959); 44 Fed. Reg. 45,359, 45,361 (1979)).

⁹See, e.g., *First State Bank of Miami v. Gotham Provision Co.*, 660 F.2d 1000, 1007 n.7 (5th Cir.), cert. denied, 103 S. Ct. 129 (1982); *Nat'l Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 673-98 (D.C. Cir. 1973), cert. denied, 415 U.S. 961 (1974); *In re Frosty Morn Meats, Inc.*, BK 77-31707, slip op. at 34-35 (Bankr. Ct. M.D. Tenn. Oct. 2, 1978) ("exact language" specified in the regulations required as to packer purchases of livestock on credit), *aff'd*, 7 BR 288 (M.D. Tenn. 1980), appeal dismissed, No. 81-6158 (6th Cir. Apr. 23, 1981).

The same goal achieved by the regulation (9 CFR § 201.81) could be achieved by requiring all employees of a registrant who are actually engaged in buying or selling livestock to register separately from their employer. That is, such employees could themselves be required to register as market agencies or dealers. The Act defines "market agency" and "dealer" as follows (7 U.S.C. § 201(c), (d)):

(c) The term "market agency" means any person engaged in the business of (1) buying or selling in commerce livestock on a commission basis or (2) furnishing stockyard services; and

(d) The term "dealer" means any person, not a market agency, engaged in the business of buying or selling in commerce livestock, either on his own account or as the employee or agent of the vendor or purchaser.¹⁰

The term "stockyard services" is defined as (7 U.S.C. § 201(b)):

(b) The term "stockyard services" means services or facilities furnished at a stockyard in connection with the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in commerce, or livestock.

Livestock auctioneers fit the definitions of a market agency and a dealer and, therefore, the Secretary could require their individual registration. The regulation prohibiting their employment while suspended merely accomplishes the same purpose in a more economical manner. It is clearly within the Secretary's authority under the Act.

For the foregoing reasons, the following order should be issued in this proceeding.

ORDER

Respondent Jerry Millspsough, his agents and employees, directly or through any corporate or other device (including Randy Davis d/b/a Cattleman's Commission Company), in connection with his business operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Failing to deposit in any Custodial Account for Shipper's Proceeds which he is required to establish and maintain under the Act and regulations, within the time prescribed by section 201.42 of

¹⁰ During the early years of administration of the Act, the Secretary went much further than he presently does in requiring the individual registration of persons involved in buying or selling livestock for a firm.

the regulations (9 CFR § 201.42), amounts equal to the outstanding proceeds receivable due from the sale of consigned livestock;

2. Failing to otherwise maintain any Custodial Account for Shippers' Proceeds which he is required to establish and maintain under the Act and regulations in strict conformity with the provisions of section 201.42 of the regulations (9 CFR § 201.42);

3. Using funds received as proceeds from the sale of livestock sold on a commission basis for purposes of his own or for any purpose other than the payment of lawful marketing charges and the remittance of net proceeds to the consignors and shippers of livestock;

4. Issuing checks in payment of the net proceeds resulting from the sale of consigned livestock without having and maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented;

5. Failing to remit to the owners and consignors of livestock, when due, the net proceeds resulting from the sale of consigned livestock;

6. Purchasing livestock consigned for sale on a commission basis for his own speculative accounts, or for the speculative account of any market agency selling on commission in which he is a part owner;

7. Submitting accounts of sale to consignors that fail to disclose the true and correct names of the purchasers and the nature of the relationship, if any, between the market agency selling on commission;

8. Financing the purchases by any dealer or market agency of livestock consigned to respondent for sale on a commission basis;

9. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented;

10. Failing to pay, when due, the full purchase price of livestock;

11. Failing to pay the full purchase price of livestock; and

12. Exchanging or "swapping" drafts or checks with any person for the purpose or with the effect of concealing the true amount of funds available in any checking or other bank account, or of creating a false "float" or balance in any such account.

Respondent Jerry Millsbaugh shall keep and maintain accounts, records and memoranda which fully and correctly disclose all transactions involved in his business subject to the Packers and Stockyards Act including the following:

1. A general ledger of accounts showing assets, liabilities, income, expenses and net worth. This ledger shall be posted on a current basis. All entries shall be supported by appropriate documentation and all such documentation shall be maintained for a period of at least 2 years.
2. A complete and accurate subsidiary ledger for notes payable and notes receivable. This subsidiary ledger shall show the original date and amount, name of person or firm payable to or receivable from, interest rate, payment and maturity terms, dates and amounts of payments and balance.
3. A complete and accurate subsidiary ledger for accounts receivable and accounts payable. This subsidiary ledger shall show the name of the person or firm receivable from or payable to, date and amount of debit and credit entries and the balance.
4. Copies of all purchase and sales invoices documenting livestock dealer transactions, and copies of all checks or drafts, check stubs, bank statements, deposit slips or similar bank documents which relate to such dealer transactions, and any other records which are necessary to show for each transaction the true name of the buyer and seller, the number of head, weight, price, and other material conditions of the purchase or sale, the date and place of the purchase or sale, and the date payment was made or received.
5. Copies of all accounts of sale and accounts of purchase evidencing the sale of livestock on a commission basis by respondent Jerry Millsbaugh and deposit slips, or similar bank documents, scale tickets, receiving tickets, and load-out sheets which relate to the sale of livestock on a commission basis, and any other records which are necessary to show for each transaction, the true and complete name of the consignor, owner or shipper of the livestock, the number of head, weight and price received for such livestock, the date consigned, the date sold, the true and complete name of the buyer of such livestock, the date payment was received, and the date payment was deposited to the custodial account.
6. Monthly reconciliations of the custodial account required of market agencies selling on commission to include a complete and accurate listing, by date, of all receivables due from the sale of livestock on a commission basis and a complete and accurate listing of all outstanding custodial account checks.
7. Monthly reconciliations of other bank accounts used in connection with transactions subject to the Act to include a complete and accurate listing of outstanding checks drawn on such accounts.
8. A complete and accurate market support journal showing all purchases for market support, the price paid therefor, the date such livestock was disposed of and the price received.

Respondent Jerry Millspaugh is suspended as a registrant under the Act for a period of 5 years.

The suspension of respondent Jerry Millspaugh shall not constitute a bar on his employment by any other registrant under the Act in the capacity of a salaried or hourly wage auctioneer after the completion of the first year of his 5-year period of suspension.

The cease and desist and record keeping provisions of this order shall become effective on the day after service of this order. The suspension provisions of this order shall become effective on the 30th day after service of this order.

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APPENDIX A
Farmers & Ranchers Livestock Auction, Inc./ Rex White d/b/a White Auction Company
Schedule of Charges/Fees Tracked Between Parties

Date of Loan	Drawn On	Drawn By	Amount	Date of Deposit	Amount Deposited To	Date Draft Paid	Notes L/S In-volved	Date of Check	Issued By	Issued To	Check Number	Amount	Date Deposited	Accountant's Initials	General No
8-25-83	Box White	Farms & Ranches	39957.46	8-25-83	F&R Gen	9-2-83	No	8-31-83	F&R	Box White	4101	57518.12	9-1	General	No
8-26	Box White	Farms & Ranches	32368.40	8-26-83	F&R Cust.	9-8-83	No	8-31-83	F&R	Box White	4103	30003.04	9-7	General	No
8-31	Box White	Farms & Ranches	52688.19	8-31-83	F&R Cust.	9-8-83	No	8-31-83	F&R	Box White	4104	57217.83	9-6	General	165 Star
8-31	Box White	Farms & Ranches	54627.78	8-31-83	F&R Gen	9-8-83	No	9-1-83	F&R	Box White	4102	17591.83	9-2	General	No
9-15	Box White	Farms & Ranches	43718.07	9-15-83	F&R Gen	9-21-83	No	9-10-83	F&R	Box White	4091	43120.00	9-19	General	92 Mt

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White	Gen	Age	Sex	Weight	Value	General	General
9-25	Gen	9-25	Box	4127	27549.00	9-25	General Cattle
		88	White		51069.10		
9-25	Gen	9-25	Box	1059	30747.85	9-25	General 17 hd.
		88	White				
9-25	Gen	9-25	Box	3716	12383.00	9-25	General 20 hd.
		88	White		43382.30		
10-4	Gen	10-4	Box	1642	30741.87	10-7	General 92 hd.
		81	White				
10-4	Gen	10-4	Box	8767	30079.00	10-7	General 95 hd.
		88	White		56611.87		
11-4	Gen	11-4	Box	3843	30077.40	11-8	General 107 hd.
		81	White				
11-4	Gen	11-4	Box	3884	34868.00	11-9	General 92 hd.
		88	White		54043.40		

APPENDIX B

Excerpt from *In re Worsley*, 33 Agric. Dec. 1547, 1556-71 (1974).

U.S.D.A. Sanction Policy

[Excerpt omitted.—Ed.]

MISCELLANEOUS DISCIPLINARY DECISIONS

In re: HARLLAKE ROBERTS. P&S Docket No. 6527. Decided February 18, 1986.

Stephen Laporella, for complainant.
Respondent, pro se.

Decision by John A. Campbell, Administrative Law Judge.

SUPPLEMENTAL ORDER

On February 4, 1986, an order was issued in the above-captioned matter which, *inter alia*, suspended the respondent as a registrant under the Act for a period of thirty days and thereafter until he obtained an adequate bond or its equivalent.

Complainant has requested that the suspension order be modified, at the expiration of the thirty day period, to allow the respondent to operate as an employee of another registrant under the Act. Therefore,

IT IS HEREBY ORDERED that the order issued on February 4, 1986, is modified to permit the respondent to operate as an employee of another registrant under the Act, after the expiration of the thirty day period of suspension. The order shall remain in full force and effect in all other respects.

In re: JAMES E. SUHR. P&S Docket No. 6528. Decided February 19, 1986.

Jerry Hochberg, P&S Div. OGC, for complainant.
Respondent, pro se.

Decision by Dorothea A. Baker, Administrative Law Judge.

SUPPLEMENTAL ORDER

On January, 6, 1986, an order was issued in the above-captioned matter, which, *inter alia*, suspended respondent as a registrant under the Act until such time as he filed and maintained an ade-

quate surety bond or its equivalent as required by the Act and the regulations.

Respondent has now filed an adequate bond or its equivalent as required by the Act and the regulations. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued January 6, 1986, is terminated. The order shall remain in full force and effect in all other respects.

In re: JAMES E. CHAPMAN. P&S Docket No. 6604. Decided February 21, 1986.

*Robert Swartzendruber, for complainant.
Respondent, pro se.*

Decision by Edward H. McGrail, Administrative Law Judge.

SUPPLEMENTAL ORDER

On January 2, 1986, an order was issued in the above-captioned matter, which, *inter alia*, suspended respondent as a registrant under the Act until such time as he complied fully with the bonding requirements under the Act and the regulations.

Respondent is now in full compliance with such requirements. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued January 2, 1986, is terminated. The order shall remain in full force and effect in all other respects.

REPARATION DECISIONS

In re: 14 CASES AGAINST B.J. HOLMES SALES INTERNATIONAL, INC.,
GARY W. HUNT d/b/a COASTAL CATTLE COMPANY, and DAVID R.
MONELL d/b/a DAMONE SALES & SERVICE. P&S Docket No.
6299. Decided January 28, 1986.

Complainant, *pro se*.

Respondent, *pro se*.

Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL AS TO RESPONDENT MONELL

These are reparation proceedings under the Packers and Stockyards Act, 1921, as amended, 7 U.S.C. 181 et seq., begun by complaints received on various dates in early 1983, alleging in substance failure to pay for livestock purchased.

Copies of each complaint, and of an investigation report prepared by the Packers and Stockyards Administration of this Department and filed in each proceeding pursuant to the Rules of Practice, were duly served on each respondent. A copy of the respective investigation report was duly served on each complainant.

In some of the cases Mr. Monell cross claimed against the Holmes firm, and in some of them the Holmes firm cross claimed against Mr. Monell.

Respondents Holmes and Hunt subsequently entered bankruptcy. Accordingly these proceedings are stayed under 11 U.S.C. 362(a)(1) as to them. The cross claims of the Holmes firm are in abeyance. The proceedings went forward only as to the claims of the complainants against Mr. Monell.

A total of 65 related cases including these were consolidated for hearing, the rights of the parties turning on the pleadings and proof in their respective proceedings notwithstanding the joint trial. AmJur2d Actions §§ 156 et seq. The oral hearing was held on May 20, 1985 in Syracuse, New York before John J. Casey of the Office of the General Counsel of this Department. No party was represented by counsel. Six witnesses testified. No exhibits were received. No brief was received.

At the hearing, complainants in the proceedings identified on the attached list, although duly notified, did not appear in person or by counsel or other representative, and no evidence was offered or received in support of their claims. Mr. Monell testified that, in all purchases of livestock made by him and involved in the 65 cases, he was acting as agent for Mr. Hunt and he disclosed this to the sellers. His testimony was credible and the record contains no evidence to the contrary.

of such livestock on that basis. *Sweeney v. Herman Management, Inc.*, 85 App. Div. 2d 34, 447 N.Y.S. 2d 164 (2 Dept. 1982).

On possible liability in court under his surety bond see *United States Fid. & G. Co. v. Clover Creek Cattle Co.*, 92 Idaho 389, 452 P. 2d 993 (1969) and *Arnold Livestock Sales Company, Inc. v. Pearson*, 383 F. Supp. 1319 (D. Nebr. 1974).

This order is the same as an order issued by the Secretary of Agriculture, being issued pursuant to delegated authority, 7 CFR § 2.35, as authorized by Act of April 4, 1940, 54 Stat. 81, 7 U.S.C. 450c-450g. See also Reorganization Plan No. 2 of 1963, 5 U.S.C. 1976 ed., app. p. 764.

On a petition to reopen a hearing, to rehear or reargue a proceeding, or to reconsider an order, see Rule 17 of the Rules of Practice, 9 CFR § 202.117.

On a complainant's right to judicial review of such an order see 5 U.S.C. 702-3 and *United States v. I.C.C.*, 337 U.S. 426.

All claims of the complainants in the proceedings identified in the attached list are dismissed as to Mr. Monell.

Copies hereof shall be served on the complainants and Mr. Monell.

LIST OF CASES

P&S Docket No. 6334

Roland H. Bean v. B. J. Holmes Sales International, Inc., Gary W. Hunt d/b/a Coastal Cattle Company, and David R. Monell d/b/a Damone Sales & Service

P&S Docket No. 6312

Russell D. Emerson v. B. J. Holmes Sales International, Inc., Gary W. Hunt d/b/a Coastal Cattle Company, and David R. Monell d/b/a Damone Sales & Service

P&S Docket No. 6305

Handy Farms, Inc. v. B. J. Holmes Sales International, Inc., Gary W. Hunt d/b/a Coastal Cattle Company, and David R. Monell d/b/a Damone Sales & Service

P&S Docket No. 6308

R. Timothy Hommel v. B. J. Holmes Sales International, Inc., Gary W. Hunt d/b/a Coastal Cattle Company, and David R. Monell d/b/a Damone Sales & Service

P&S Docket No. 6299

Gerald R. Hyatt v. B. J. Holmes Sales International, Inc., Gary W. Hunt d/b/a Coastal Cattle Company, and David R. Monell d/b/a Damone Sales & Service

P&S Docket No. 6351

David Leach v. B. J. Holmes Sales International, Inc., Gary W. Hunt d/b/a Coastal Cattle Company, and David R. Monell d/b/a Damone Sales & Service

P&S Docket No. 6309

Wayne N. Lind v. B. J. Holmes Sales International, Inc., Gary W. Hunt d/b/a Coastal Cattle Company, and David R. Monell d/b/a Damone Sales & Service

P&S Docket No. 6310

Donald Osborne and Kaye F. Osborne v. B. J. Holmes Sales International, Inc., Gary W. Hunt d/b/a Coastal Cattle Company, and David R. Monell d/b/a Damone Sales & Service

P&S Docket No. 6311

Glen W. Raym v. B. J. Holmes International, Inc., Gary W. Hunt d/b/a Coastal Cattle Company, and David R. Monell d/b/a Damone Sales & Service

P&S Docket No. 6369

Joseph E. Sventek v. B. J. Holmes Sales International, Inc., Gary W. Hunt d/b/a Coastal Cattle Company, and David R. Monell d/b/a Damone Sales & Service

P&S Docket No. 6302

Ralph Tanner v. B. J. Holmes Sales International, Inc., Gary W. Hunt d/b/a Coastal Cattle Company, and David R. Monell d/b/a Damone Sales & Service

P&S Docket No. 6318

Jan Ten Pas Jr. v. B. J. Holmes Sales International, Inc., Gary W. Hunt d/b/a Coastal Cattle Company, and David R. Monell d/b/a Damone Sales & Service

P&S Docket No. 6359

Richard T. Triumpho v. B. J. Holmes Sales International, Inc., Gary W. Hunt d/b/a Coastal Cattle Company, and David R. Monell d/b/a Damone Sales & Service

P&S Docket No. 6370

Van Cleef Farms, Inc. v. B. J. Holmes Sales International, Inc., Gary W. Hunt d/b/a Coastal Cattle Company, and David R. Monell d/b/a Damone Sales & Service

EARL CHESBRO and MARY ELLEN CHESBRO v. GARY W. HUNT d/b/a COASTAL CATTLE CO., and DAVID R. MONELL d/b/a DAMONE SALES & SERVICE v. B.J. HOLMES SALES INTERNATIONAL INC., GERALD YOUNG, STUART YOUNG, and DOUGLAS YOUNG d/b/s SPRUCE-EDEN FARMS v. B.J. HOLMES SALES INTERNATIONAL, INC., GARY W. HUNT d/b/a COASTAL CATTLE CO., and DAVID R. MONELL d/b/a DAMONE SALES AND SERVICE. P&S Docket No. 6313 & 6348. Decided January 28, 1986.

Complainant, pro se.

Respondent, pro se.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL AS TO RESPONDENT MONELL

These are reparation proceedings under the Packers and Stockyards Act, 1921, as amended, 7 U.S.C. 181 et seq., begun by complaints received in early 1983, alleging in substance failure to pay for livestock purchased.

In each proceeding, copies of the complaint, and of an investigation report prepared by the Packers and Stockyards Administration of this Department and filed in the proceeding pursuant to the Rules of Practice, were duly served on each respondent, and a copy of the respective investigation report was duly served on complainants.

Respondents Holmes and Hunt subsequently entered bankruptcy. Accordingly the proceedings are stayed under 11 U.S.C. 362(a)(1) as to them. The cross claims of the Holmes firm are in abeyance. The proceedings went forward only as to the claims of the above-named complainants against Mr. Monell.

A total of 65 related cases including these were consolidated for hearing, the rights of the parties turning on the pleadings and proof in their respective proceedings notwithstanding the joint trial. *AmJur2d Actions* §§ 156 et seq. The oral hearing was held on May 20, 1985 in Syracuse, New York before John J. Casey of the Office of the General Counsel of this Department. No party was represented by counsel. Six witnesses testified, including Mr. & Mrs. Chesbro, Mr. Stuart Young, and Mr. Monell. No exhibits were received. No brief was received.

Between the complainants and Mr. Monell, it is undisputed that the latter, in the purchases of livestock made by him and involved in these two cases, was acting as agent for Mr. Hunt and disclosed this to the sellers. He is not liable for the unpaid price of any of such livestock on that basis. *Sweeney v. Herman Management, Inc.*, 85 App. Div. 2d 34, 447 N.Y.S. 2d 164 (2 Dept. 1982).

On possible liability in court under his surety bond see *United States Fid. & G. Co. v. Clover Creek Cattle Co.*, 92 Idaho 889, 452 P. 993 (1969) and *Arnold Livestock Sales Company, Inc. v. Pearson*, 3 F. Supp. 1319 (D. Nebr. 1974).

This order is the same as an order issued by the Secretary of Agriculture, being issued pursuant to delegated authority, 7 CFR 1535, as authorized by Act of April 4, 1940, 54 Stat. 81, 7 U.S.C. 6c-450g. See also Reorganization Plan No. 2 of 1953, 5 U.S.C., 76 ed., app. p. 764.

On a petition to reopen a hearing, to rehear or reargue a proceeding, or to reconsider an order, see Rule 17 of the Rules of Practice, 9 CFR § 202.117.

On a complainant's right to judicial review of such an order see 5 S.C. 702-8 and *United States v. I.C.C.*, 337 U.S. 426.

The claims of Mr. & Mrs. Chesbro, and of Messrs. Young, in the proceedings, are dismissed as to respondent Monell.

Copies hereof shall be served on the complainants and Mr. Monell.

CLIFTON CATTLE COMPANY, INC., v. SIOUX CITY LIVESTOCK MARKETING, INC., AND WESTERN IOWA FARMS COMPANY. P&S Docket No. 6192. Decided February 10, 1986.

Violation of the P&S Act.

Re P&S Docket No. 6192, Clifton Cattle Company, Inc. complainant, v. Sioux City Livestock & Marketing, Inc., and Western Iowa Farms Company, respondents; Presiding officer John J. Casey ruled in favor of Clifton Cattle Company. Findings showed that complainant and respondent, Western Iowa, had in early February, 83, separately placed cattle at a Nebraska feed lot, whose operator mixed 21 steers of complainant with 39 of Western Iowa. On February 4 a large death loss occurred at the feed lot. On that day Western Iowa moved surviving steers to another pen. Next day complainant's agent went to move his cattle but found not only they were fewer than the number originally placed there, but fewer than he had counted the day before. Western Iowa, later sold the steers it had removed on the Sioux City Stockyards. Some of the steers sold belonged to complainant. Western Iowa knew this but never troubled to sort out which ones belonged to complainant, he received nothing on account of such steers. Because Western Iowa, sold all surviving steers moved from the original pen, knowing that some belonged to complainant, but without ascertaining how many, it was no longer possible to identify which of the surviving steers belonged to which of the parties. By mathematical calculation of the total number of cattle of both parties involved, Presiding Officer Casey determined, consequently, that of the net proceeds obtained by Western Iowa in the sale of the surviving cattle, a 21/59 quota was to go to complainant. He thus ordered Western Iowa to pay complainant, Clifton Cattle Co., Inc., \$5,683.43 with 12% interest. The net proceeds of the sale of the 60 steers was \$16,529.71 net proceeds ab-

tained by Western Iowa. The complainant as to Sioux City Livestock Marketing, Inc., was dismissed by the Presiding Officer.

John D. Hartigan, Jr., Omaha, Neb., for complainant.

Victor J. Lich, Jr., Lich, Harold & Mackiewicz, Omaha, Neb., for respondent Sioux City only.

Respondent, pro se (Western Iowa).

John J. Casey, Presiding Officer.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Packers and Stockyards Act, 1921, as amended, begun by a written complaint received on March 29, 1983, alleging in substance conversion of certain livestock. The amount claimed was \$17,786.21.

Copies of the complaint, and of an investigation report prepared by the Packers and Stockyards Administration of this Department and filed in this proceeding pursuant to the Rules of Practice, were served on respondents on June 17, 1983. A copy of the investigation report was served on complainant on the same day. Respondents filed an answer and request for oral hearing on June 27, which was served on complainant on July 25.

An oral hearing was held on November 30, 1983 in Omaha, Nebraska, before John J. Casey of the Office of the General Counsel of this Department. Complainant was represented by John D. Hartigan, Jr., Esq., and respondents were represented by Victor J. Lich, Jr., Esq., both of Omaha. Six witnesses testified. Nine exhibits were received. Thereafter testimony of Gerald A. Lutjens was taken by deposition and made a part of the record by agreement of the parties. Both sides filed briefs.

FINDINGS OF FACT

1. Complainant Clifton Cattle Company, Inc., a corporation, at all times material herein was engaged in business as a market agency buying livestock on commission, and as a dealer buying and selling livestock for its own account, in commerce, with a principal place of business at Clifton, Texas, and so registered with the Secretary under the Act.

2. Respondent Sioux City Livestock Marketing, Inc., a corporation, at all times material herein was engaged in business as a market agency buying and selling livestock on commission, operating on the Sioux City Stockyards, Sioux City, Iowa, a posted stockyard subject to the Act, thus in commerce, and so registered with the Secretary under the Act.

3. Respondent Western Iowa Farms Company, a corporation, at all times material herein was engaged in business as a market agency and dealer buying and selling livestock on commission and for its own account, operating on locations including the Union Stock Yards, Omaha, Nebraska, a posted stockyard subject to the Act, thus in commerce, and so registered with the Secretary under the Act.

4. Prior to February 4, 1983, complainant and respondent Western Iowa had separately placed cattle for feeding at a feedlot near Platte Center, Nebraska. The feedlot operator, in what was called Pen 6, had commingled 21 steers of complainant with 38 steers and certain heifers of Western Iowa. In the following months a large death loss occurred at the feedlot, of which the operator did not keep the parties informed.

5. On February 4, 1983, respondent Western Iowa by agent removed all the then surviving steers from Pen 6, as well as the other animals of Western Iowa, and transported them to another feedlot where they remained until on or about March 2.

6. On dates as follows, respondent Western Iowa caused the then surviving steers which had been removed on February 4 from Pen 6 to be sold on the Sioux City Stockyards, for proceeds as follows:

Date	Steers	Gross Pro- ceeds	Ex- penses of Sale	Net Pro- ceeds
March 2	1	\$268.45	\$11.52	\$256.93
March 2	31	12,270.02	\$57.12	11,912.90
March 2	12	4,205.92	138.24	4,067.68
March 30	1	298.76	7.10	291.66
Total:	45			\$16,529.77

Some of the steers belonged to complainant, and Western Iowa by agents knew this, but never either sorted them out, identified which ones, or even ascertained how many. Complainant has received nothing on account of such steers.

7. The complaint was filed within 90 days of accrual of the cause of action alleged therein.

CONCLUSIONS

In the Fall of 1982 complainant and respondent Western Iowa separately placed cattle in a certain commercial feedlot near Platte Center, Nebraska, operated by Gerald A. Lutjens, not a party

herein. Complainant placed 619 steers. Western Iowa placed 359 larger heifers, 271 smaller heifers, and 38 steers. No other animals were there. In the following months a large death loss occurred there, at least 327 animals, of which the feedlot operator did not keep the parties informed. In early February of 1983, shortly before the feedlot operator became bankrupt, each of such parties learned that the condition of its cattle had deteriorated and determined to move them elsewhere. On Friday, February 4, Western Iowa by agent removed cattle, fewer than it had placed there. The next day, Saturday, February 5, complainant's agent went there to remove its cattle and found, not only fewer than complainant had placed there, but fewer than complainant's agents had counted there the day before. Of the animals removed by Western Iowa, and later sold at Sioux City by Western Iowa, it is undisputed that some belonged to complainant and Western Iowa knew this. The question is how many and of what value.

On Friday morning, February 4, complainant's agent Gordon Reisinger went to the Lutjens feedlot. Mr. Alan Larsen, who operated another commercial feedlot, went with him. Both got into three pens assigned to complainant, and counted the steers by running them between themselves. Their respective counts varied by a very few animals but were approximately 380. The feedlot operator, Mr. Lutjens, was present and told them there were others belonging to complainant in another place, called Pen 6, commingled with the smaller heifers and the steers belonging to Western Iowa. The number he told them was 21 but it is clear that this was the number of complainant's animals originally commingled with Western Iowa's and not necessarily the number then surviving. All three men then departed together to transact other business in Leigh and Columbus, Nebraska. They parted company in Columbus. Mr. Larsen arranged for trucks to remove complainant's animals and take them to Mr. Larsen's feedlot the next morning.

Mr. Lutjens returned to his feedlot about 5:00 that afternoon and found a number of trucks, and Western Iowa's agent Charles Leonard loading cattle from Pen 6, in which 21 steers of complainant had been commingled with the smaller heifers and the 38 steers of Western Iowa. At least one truck had already departed. That departed truck must have contained animals from Pen 6, based on Mr. Leonard's testimony (Tr. 53) that he loaded the animals from that pen before loading any of the animals, called the "Dose cattle," from the other pen assigned to Western Iowa. Mr. Lutjens observed some of complainant's animals being loaded (the ear tags were of a different design) and told Mr. Leonard this. The latter said in substance that that would have to be taken care of later as

sorting was impossible under the circumstances. Western Iowa had brought a total of 668 animals to the Lutjens feedlot, of which 38 were steers, but that day it removed a total of 566, of which 45 were steers. Western Iowa's agents denied that they removed any animals from the three pens assigned to complainant, in which Messrs. Reisinger and Larsen had earlier that day counted the animals. However they acknowledged an obligation to complainant for seven, the difference between 38 and 45; for this to be correct the death loss at the feedlot would have had to included none of Western Iowa's steers.

That evening Mr. Lutjens phoned Mr. Reisinger and told him that Western Iowa had removed some of complainant's cattle from the Lutjens feedlot that day.

The next morning, Saturday, February 5, the truckers hired by Mr. Larsen arrived at the Lutjens feedlot and began loading complainant's animals before Mr. Larsen arrived there. Mr. Reisinger did not go there that day.

Also that Saturday morning Mr. Leonard returned to see if there were any more Western Iowa cattle there. He found none. While he was there, Mr. Reisinger phoned the Lutjens home to inquire about the loading of complainant's cattle. Mrs. Lutjens told him that some had been removed by Western Iowa the night before, and that Mr. Leonard was there. Mr. Reisinger asked to speak to Mr. Leonard, and Mrs. Lutjens tried to summon him. Mr. Leonard testified (Tr. 55):

Q. Did Mr. and Mrs. Lutjens come out and tell you that Gordon Reisinger's on the the phone, he wants to talk to you?

A. Mrs. Lutjens came out, was crying, wanted me to come to the house to use the phone. And I told her I wanted to leave before the snowstorm got any worse. She went back to the house and then came back and said Gordon Reisinger's on the phone. And I told her to tell Gordon we'd talk to him later.

Q. Did she tell you why he was calling?

A. No, she did not.

Mr. Lutjens testified (Deposition 10), "Mr. Leonard was with me in my pickup, and my wife called us on the radio, and he says he didn't want to talk to him." Mr. Reisinger testified (Tr. 26):

Mr. Lutjens told me that our cattle were transported out by Western. Mrs. Lutjens told me on Saturday morning,

and I asked her if I could speak to Chuck Leonard and if she would call him. And she came back to the phone and said he didn't want to talk to me.

Mr. Reisinger then phoned Mr. Hugh "Scotty" Mactier, President of both respondent corporations, and told him of his information that the latter had some of complainant's cattle. Mr. Mactier promised to check it out and call him back.

Mr. Mactier then directed Mr. Leonard to go to the feedlot where Western Iowa had taken the animals which it had removed, and count the steers, but without getting any of the animals up because they were in bad condition. Mr. Mactier testified (Tr. 62):

So Charlie [Leonard] went out and walked through the pen, called me back, and he said he thought he counted about 35 cattle. And so I called Gordon [Reisinger] back approximately 11:00 or thereabouts; and I said we walked through the cattle, we think we've got 35 steers in there and we want \$8; and so as of this moment I don't know that we have any of your cattle.

Mr. Mactier also testified that in this second phone call he told Mr. Reisinger where Western Iowa had taken the animals, Ruser's. "I may have said Ruser's at Valley instead of at Venice, but I told him they were at Ruser's." Mr. Reisinger testified that he was told that Western Iowa had taken the animals to Valley, and had no cattle belonging to complainant. By the time Mr. Reisinger understood where Western Iowa had taken the animals, about a month later, they had been moved again, this time to Sioux City for sale there.

Complainant had brought 619 steers to the Lutjens feedlot, and on Friday, February 4, Messrs. Reisinger and Larsen had counted approximately 380 in the three pens assigned to complainant, but on Saturday, February 5, the number removed by complainant's truckers from the same pens was only 353. About the cause of the difference between the 380 and the 353, the record does not support a finding.

Of the 566 animals removed by Western Iowa from the Lutjens feedlot on Friday, February 4, 331 were all heifers and belonged to another for whom it was acting as agent, leaving 235 others including 45 steers. Of the latter, some heifers died at Ruser's. The remaining heifers, and the steers, were taken to Sioux City, Iowa at the beginning of March and sold as set forth in the Findings of Fact above.

Western Iowa offered complainant seven times the average price obtained for the 45 steers. It made no effort to sort out the steers

belonging to complainant and either return them or sell them separately, or even to ascertain how many there were.

The investigation report, complainant's evidence and the Lutjens deposition show clearly that 21 steers of complainant had been commingled with 38 steers of Western Iowa in the Lutjens Pen 6, that Western Iowa removed all the surviving steers from that pen, and that Western Iowa later sold all surviving steers from that pen, knowing that some belonged to complainant but without ascertaining how many. Thus Western Iowa could have identified how many of those survivors belonged to which of the parties, but did not, and made it impossible for this to be done. Under the circumstances the burden of proof of the latter fact is on Western Iowa. *Campbell v. United States*, 365 U.S. 85, 96 (1961); *Old Ben Corp. v. Interior Bd. of Mine Op. App.*, 523 F.2d 25 (7 C. 1975); *Fleming v. Harrison*, 162 F.2d 789 (8 C. 1947); *Trans-American Van Service, Inc. v. United States*, 421 F. Supp. 308, 330-1 (N.D. Tex., Ft. Worth Div., 1976); *United States v. Bull Steamship Line*, 146 F.2d 210 (S.D.N.Y.), *aff'd*, 274 F.2d 877 (2 C. 1960); *AmJur2d Evidence* § 131; and *C.J.S. Evidence* § 113.

On that basis, Western Iowa will be ordered to pay complainant the value of complainant's animals removed from Pen 6 and later sold, determined in the only way possible from the evidence in the record, that is, the proportion of animals of the parties first put into Pen 6. There were a total of 59, 21 of complainant and 38 of Western Iowa. Western Iowa will be ordered to pay to complainant 1/59 of the net proceeds of sale of the surviving steers at Sioux City on that basis. "Damages are not rendered uncertain because they cannot be calculated with absolute exactness. It is sufficient if a reasonable basis of computation is afforded, although the result is only approximate." *Eastman Co. v. Southern Photo Co.*, 273 U.S. 59, 379.

Investigation Report Exhibits B, C, and D show the gross proceeds of sale of the 45 steers in question, and the expenses of sale of those steers plus certain heifers not involved herein. We determine the net proceeds of sale of the steers sold on March 1 by dividing the expenses of sale (\$1,416.90 plus \$368.77) by the number of animals sold (155) which produces the expenses per animal (\$11.52), then multiplying, then subtracting. Thus, as shown above in the Findings of Fact, \$16,529.77 net proceeds were obtained for the 45 steers; 21/59 of that would be \$5,883.48.

Respondents contended that we have no subject-matter jurisdiction in the case. If we do not have jurisdiction over the action at the Lutjens feedlot on February 4, we certainly have jurisdiction over the action of Western Iowa on the posted stockyard at Sioux

City in March, selling animals belonging to complainant, and the disposition of the proceeds thereof. *United States v. Donahue Bros.* 59 F.2d 1019 (8 C. 1932).

Mr. Mactier testified (Tr. 95-6) credibly that respondent Sioux City Livestock had nothing to do with the transactions in dispute.

On the jurisdiction to issue a reparation order on the basis of a single transaction see *Rouse v. Platte Valley Livestock, Inc.*, 597 F. Supp. 1055, 604 F. Supp. 1463, ____ Ag. Dec. ____ (D. Nebr. 1985) and *Mid-South Order Buyers, Inc. v. Platte Valley Livestock, Inc.*, 210 Nebr. 382, 315 N.W. 2d 229, 41 Ag. Dec. 48 (1982).

This decision and order is the same as a decision and order issued by the Secretary of Agriculture, being issued pursuant to delegated authority, 7 CFR § 2.35, as authorized by Act of April 4, 1940, 54 Stat. 81, 7 U.S.C. 450c-450g. See also Reorganization Plan No. 2 of 1953, 5 U.S.C., 1976 Ed., appendix p. 764. It constitutes "an order for the payment of money" within the meaning of section 309(f) of the Act, 7 U.S.C. 210(f), which provides for enforcement of such orders by court action.

It is requested that copies of all pleadings filed by any party in any such suit be filed with the Hearing Clerk, USDA, Washington, D. C. 20250, for inclusion in the file on this reparation proceeding. It is further requested that if the construction of the Act, or the jurisdiction to issue this order, becomes an issue in any such suit, prompt notice of such fact be given to the Office of the General Counsel, USDA, Washington, D. C. 20250.

On a petition to reopen a hearing, to rehear or reargue a proceeding, or to reconsider an order, see Rule 17 of the Rules of Practice, 9 CFR § 202.117.

On a respondent's right to judicial review of such an order, see *Livestock Commission v. Hardin et al.*, 446 F.2d 4, 30 Ag. Dec. ____ Cir., 1971) and *Fort Scott Sale Co., Inc. v. Hardy*, 570 F. 144 (D. Kan. 1983). On a complainant's right to judicial review of such an order, see 5 U.S.C. 702-3 and *United States v. ...* 7 U.S.C. 426 (1949).

ORDER

On or within 30 days of the date of this order, respondent Western Arms Company shall pay to complainant Clifton Cattle Company, with interest thereon at the rate of 13% per annum until 1, 1983 until paid, \$5,883.48.
The complaint is dismissed as to respondent Sioux City Livestock, Inc.

Copies hereof shall be served upon the parties.

SAMUEL I. MORGAN v. PRODUCERS MARKETING ASSOCIATION, INC.
P&S Docket No. 6258. Decided February 10, 1986.

Reparation Proceedings under P&S Act.

In re Producers Marketing Association, Inc., P&S Docket No. 6258, Presiding Officer John J. Casey ruled in favor of complainant, Samuel I. Morgan. It was shown that complainant shipped certain animals to respondent for an agreed price. Respondent did not reject any of the animals but complained they were not as agreed-upon. So respondent deducted \$1000 in payment to complainant. Presiding Officer determined that to do that one has to have a burden of proof and such a burden was not carried in this case. Presiding Officer consequently ordered respondent, Producer Marketing Association, Inc., to pay complainant, Samuel I. Morgan, \$1000 with 13% interest until paid, with respondent's counter claim dismissed.

Complainant, pro se.

John L. Whittinger, Indianapolis, Indiana, for respondent.

Decision by John J. Casey, Presiding Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Packers and Stockyards Act, 1921, as amended, begun by a written complaint received on May 16, 1983, alleging in substance failure to pay in full for livestock purchased. The amount claimed was \$1,000.00.

Copies of the complaint, and of an investigation report prepared by the Packers and Stockyards Administration of this Department and filed in this proceeding pursuant to the Rules of Practice, were served on respondent on July 15, 1983. A copy of the investigator report was served on complainant on July 14. Respondent filed an answer and counterclaim on August 5, which was served on complainant on August 13. Complainant filed a reply on September 8 which was served on respondent on September 16.

Since neither party requested an oral hearing, a written hearing was held as provided in the Rules of Practice. John J. Casey of the Office of the General Counsel of this Department acted as presiding officer. Complainant was not represented by counsel. Respondent was represented by John L. Whittinger, Esq., Indianapolis, Indiana. Complainant presented no evidence in response to the notice of opportunity to do so. Respondent presented an affidavit only of damages in support of the counterclaim. No brief was received.

FINDINGS OF FACT

1. Complainant Samuel I. Morgan at all times material herein was engaged in business as a dealer buying and selling livestock for his own account in commerce, with a principal place of business at Ronceverte, West Virginia, and so registered with the Secretary under the Act.

2. Respondent Producers Marketing Association, Inc., a corporation, at all times material herein was engaged in business as a market agency buying livestock on commission and a dealer buying and selling livestock for its own account, in commerce, with a principal place of business at Indianapolis, Indiana, and so registered with the Secretary under the Act.

3. On or about March 14, 1983 complainant caused to be shipped, from a place in West Virginia to another place in Indiana designated by respondent, certain animals for an agreed price. Respondent communicated no timely rejection of them, but expressed a complaint about them and transmitted \$1,000.00 less than the agreed price.

4. The complaint was filed within 90 days of accrual of the cause of action alleged therein.

CONCLUSIONS

It is undisputed that complainant caused to be shipped certain animals to the place designated by respondent for an agreed price, and that respondent paid \$1,000.00 less than that price. It is further undisputed that respondent did not communicate any rejection of the animals, but complained that they were not what had been agreed-on.

The sort of animals agreed-on, the sort shipped, or the substance of respondent's customer's complaint about them, cannot be identified from the evidence in the record, or from the unsworn correspondence.

Under U.C.C. § 2-602(1) rejection of goods must be within a reasonable time after their delivery or tender and is ineffective unless the buyer seasonably notifies the seller. Under § 2-606(b) acceptance of goods occurs when the buyer fails to make an effective rejection but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them. Under § 2-607(1) and (4) the buyer must pay at the contract rate for any goods accepted, and the burden is on the buyer to establish any breach with respect to goods accepted.

So far as the record shows, respondent's customer was unhappy with the animals so respondent deducted \$1,000.00 when it paid

complainant. Anyone doing that has a burden of proof, and such a burden was not carried in this case.

On failure to pay in full for livestock purchased as an unfair or unjust practice within the meaning of the Act, see Section 409, 7 U.S.C. 228b, and *Vance v. Reed*, 495 F. Supp. 852, 39 Ag. Dec. 1117 (M.D. Tenn., Nashville Div., 1980).

Section 309 of the Act provides for reparation orders against market agencies and dealers for violation of certain provisions including Section 307 which includes a prohibition against unjust practices. See discussion, *Rice v. Wilcox*, 630 F.2d 586, 39 Ag. Dec. 583 (8 C. 1980).

On the jurisdiction to issue a reparation order on the basis of a single transaction see *Hays Livesth. Com'n. Co., Inc. v. Maly Livesth. Com'n. Co., Inc.*, 498 F.2d 925, 33 Ag. Dec. 1122 (10 C. 1974); *Rice, supra*; *Rousse v. Platte Valley Livestock, Inc.*, 597 F. Supp. 1055, 604 F. Supp. 1463, ____ Ag. Dec. ____ (D. Nebr. 1985) and *Mid-South Order Buyers, Inc. v. Platte Valley Livestock, Inc.*, 210 Nebr. 382, 815 N.W. 2d 229, 41 Ag. Dec. 48 (1982).

This decision and order is the same as a decision and order issued by the Secretary of Agriculture, being issued pursuant to delegated authority, 7 CFR § 2.35, as authorized by Act of April 4, 1940, 54 Stat. 81, 7 U.S.C. 450c-450g. See also Reorganization Plan No. 2 of 1953, 5 U.S.C., 1976 Ed., appendix p. 764. It constitutes "an order for the payment of money" within the meaning of section 309(f) of the Act, 7 U.S.C. 210(f), which provides for enforcement of such an order by court action instituted by complainant.

It is requested that copies of all pleadings filed by any party in any such suit be filed with the Hearing Clerk, USDA, Washington, D. C. 20250, for inclusion in the file on this reparation proceeding. It is further requested that if the construction of the Act, or the jurisdiction to issue this order, becomes an issue in any such suit, prompt notice of such fact be given to the Office of the General Counsel, USDA, Washington, D. C. 20250.

On a petition to reopen a hearing, to rehear or reargue a proceeding, or to reconsider an order, see Rule 17 of the Rules of Practice, 9 CFR § 202.117.

On a respondent's right to judicial review of such an order, see *Maly Livestock Commission v. Hardin et al.*, 446 F.2d 4, 30 Ag. Dec. 1063 (8 Cir., 1971) and *Fort Scott Sale Co., Inc. v. Hardy*, 570 F. Supp. 1144 (D. Kan. 1983).

ORDER

Within 30 days of the date of this order, respondent Producers Marketing Association, Inc. shall pay to complainant Samuel I.

Morgan, with interest thereon at the rate of 13% per annum
May 1, 1983 until paid, \$1,000.00.

Respondent's counterclaim is hereby dismissed.

Copies hereof shall be served upon the parties.

Re: AUGUST BATTAGLIA COMPANY, INC., PACA Docket No. 2-7048.
Decided January 22, 1986.

failure to make full payment for fruit purchases.

Re August Battaglia Company, Inc., PACA Docket No. 2-7048, complainant shows respondent failed to account properly and make full payment for six lots of fruit from five shippers and underreporting and underpaying its principals an amount totaling \$50,901.54. Full restitution has now been made to all shippers by respondent, whose license was suspended for 45 days by Administrative Law Judge John A. Campbell.

Edward Silberstein, for complainant.

Eg W. Gudgeon, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*; hereinafter referred to as the "Act"), instituted by a complaint filed on December 26, 1985, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture.

The complaint alleges that during the period September 1983 through November 1984, Respondent received on consignment, in interstate commerce, six lots of fruit from five shippers, but failed to account truly and correctly and to make full payment promptly to the shippers of the net proceeds realized from the sale of this fruit, in the total amount of \$50,901.54. A copy of the Complaint was served upon Respondent. The Respondent and Complainant have now agreed to the entry of a Decision and Order as set forth herein. Therefore, pursuant to Section 1.138 of the Rules of Practice (7 CFR 1.138), the following Decision and Order is issued without further procedure or hearing.

FINDINGS OF FACT

1. August Battaglia Company, Inc., (hereinafter "Respondent"), is an Illinois corporation whose mailing address is 2545 South Ashland Avenue, Chicago, Illinois 60605.

2. Pursuant to the licensing provisions of the Act, license number 106488 was issued to Respondent on March 27, 1947. This license has been renewed annually, and is next subject to renewal on or before March 27, 1986.

3. The Secretary has jurisdiction over Respondent and the subject matter involved herein.

4. As set forth more fully in paragraph 5 of the Complaint, during the period September 1983 through November 1984, Respondent failed to account truly and correctly and make full payment promptly to five shippers of the net proceeds realized from the sale of fruit, all being perishable agricultural commodities, received and accepted in interstate commerce. Respondent underreported and underpaid its principals an amount totaling \$50,901.54.

5. Respondent has made full restitution to the shippers of the amounts due with respect to the consignment transactions set forth in Finding of Fact 4.

CONCLUSIONS

Respondent has committed willful, flagrant and repeated violations of Section 2 of the PACA (7 U.S.C. 499b), by failing to make full payment promptly with respect to the transactions set forth in Finding of Fact No. 4 above, for which the Order below is issued

ORDER

Respondent's license is suspended for 45 days.
This order shall become effective January 22, 1986.
Copies hereof shall be served upon the parties.

In re: TRI-COUNTY WHOLESALE PRODUCE CO., INC. PACA Docket No. 2-6900. Decided January 17, 1986.

Employment violation of the Act.

The Judicial Officer reversed Judge Baker's order requiring respondent to cease and desist from permitting Robert Ferwerda from being in respondent's office or performing other duties for respondent. The Judicial Officer revoked respondent's license for continuing to employ Robert Ferwerda after respondent was advised that he could only be employed if an appropriate bond were filed (since Robert Ferwerda failed to pay reparation awards). Interpretation and legislative history of employment restrictions discussed. The harsh "employment" restrictions are consistent with the general pattern of imposing severe sanctions against persons who fail to pay for produce, irrespective of what excuses they offer. The Judicial Officer gives great weight to ALJ findings, but has reversed as to the facts, where appropriate. The word "any" is a broad and comprehensive term. Complaint need only prevail by a preponderance of the evidence. There is no showing that the Secretary unreasonably delayed in setting the amount of the bond, but that would not be a good defense in any event. Respondent cannot collaterally attack the determination as to the amount of the bond by way of defense in a disciplinary proceeding. The failure to publish the bond determination factors in the Federal Register would not be a valid defense, but even if the issue could be raised here, the factors considered in determining a bond are not substantive rules of general applicability or statements of general policy and, therefore, they are not required to be published. Actual notice of the bond determination factors would preclude reliance on any failure to comply

with publication requirements, even if publication were required. Respondent's violations were willful, but willfulness is not required since respondent had received a warning letter. The definition of willful in *TWA v. Thornton* is inapplicable in our Department's disciplinary proceedings. The ALJ's cease and desist order is unlawful since there is no statutory authority in PACA for a cease and desist order, and, also, the statutory restriction as to employment of a restricted person is applicable only within 2 years after the issuance of a reparation award. Respondent's petition to open the hearing to take further evidence with respect to the meaning of "employment" and as to the determination of respondent's bond is denied.

Jennis Becker, for complainant.

Stephen P. McCarron, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*),¹ in which Administrative Law Judge Dorothea A. Baker (ALJ) filed an initial Decision and Order on August 2, 1985, ordering respondent to cease and desist from permitting Robert Ferwerda from being in respondent's office, answering respondent's telephone or engaging in conversations on the telephone or elsewhere relating to respondent's business, acting as agent on behalf of others relating to respondent, and hauling produce for respondent. The ALJ's order applies unless respondent has an appropriate employment bond as to Robert Ferwerda approved by the Secretary, and suspends respondent's license for 6 months if it violates the order.

On August 13, 1985, complainant appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.85).² On August 28, 1985, respondent filed a cross-appeal and a motion to reopen the hearing.

Oral argument before the Judicial Officer, which is discretionary (7 CFR § 1.145(d)), was requested by respondent, but is denied inas-

¹ See generally Campbell, "The Perishable Agricultural Commodities Act Regulatory Program," in 1 Davidson, *Agricultural Law*, ch. 4 (1981 and Aug. 1985 Supp.), and Becker and Whitten, "Perishable Agricultural Commodities Act," in 10 Harl, *Agricultural Law*, ch. 72 (1980).

² The position of the Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450e-450g), and Reorganization Plan No. 2 of 1963, 18 Fed. Reg. 3213 (1953), reprinted in 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

much as the issues are not complex, the case has been thoroughly briefed, and oral argument would seem to serve no useful purpose.

The principal issue in this case is whether Robert Ferwerda was "employed" by respondent after March 22, 1982, which is 30 days after respondent was notified by the Department that it could not employ Robert Ferwerda without an employment bond approved by the Secretary. Employment is defined as "any affiliation of any person with the business operations of a licensee, with or without compensation, including ownership or self-employment" (7 U.S.C. § 499a(10)). For the reasons set forth below, I have found and concluded that Robert Ferwerda was employed by respondent from August of 1981 to the date of the oral hearing in this case (February 13-15, 1984), and that respondent's license should be revoked.

FINDINGS OF FACT

1. Respondent, Tri-County Wholesale Produce Co., Inc. (hereinafter Tri-County), has a business address of 1202 Hammondville Road, Office No. 15, Pompano Beach, Florida 33060.

2. Respondent was first licensed on September 8, 1981. Its license has been renewed annually, and is next subject to renewal on or before September 8, 1986.

3. On November 23, 1979, a license to do business under the PACA was issued to Robert A. Ferwerda, doing business as Four Seasons Wholesale Produce (hereinafter Four Seasons). This license was renewed annually, but terminated on November 23, 1981, when that firm failed to pay the annual license fee.

4. Robert A. Ferwerda was the sole owner of Four Seasons.

5. Six reparation awards were issued against Robert A. Ferwerda, doing business as Four Seasons, between December 16, 1981, and August 6, 1982. All of these awards have remained unpaid to date.

6. On January 21, 1982, the Department wrote a letter to Robert A. Ferwerda advising him that the reparation awards had not been paid and stating:

The purpose of this letter is to call your attention to the fact that until these awards are satisfied, you are not eligible to obtain a license under the Act. Furthermore, you cannot be employed by or affiliated in any capacity with any other licensee under the Act for a period of two years from the date of the orders without the approval of the Department.

7. The business address of Four Seasons during the time it was doing business was 1202 Hammondville Road, Office No. 15, Pom-

pamo Beach, Florida 33060. It ceased doing business in July 1981. In August 1981, Tri-County began doing business at the same address. When Tri-County began to do business, it took over most of the better accounts of Four Seasons. Robert A. Ferwerda became an employee of Tri-County with many responsibilities with respect to the daily management of that organization. The only function which he did not perform which he had performed as the owner of Four Seasons was making the final financial decisions as to dealing with the accounts payable and accounts receivable. He was responsible for the purchase and sale of produce, including determining the price at which goods would be purchased and sold. He was responsible for the hiring and firing of employees. He supervised all of the employees in respondent firm. He made decisions with respect to the transportation of commodities. He managed the physical receipt and disposition of produce at the business location. He also performed such other managerial tasks as were necessary for the proper carrying on of the day to day business of respondent.

8. Robert A. Ferwerda was not, however, an officer, director, or owner of any stock in Tri-County. Rather, his father, Arend Ferwerda, was the owner, president, and a director of respondent. In addition, Sheila Quick, a bookkeeper with respondent, was secretary-treasurer and a director.

9. In a letter dated February 16, 1982, which was received by Tri-County on February 19, 1982, the Secretary of Agriculture notified respondent that Robert A. Ferwerda was not eligible to be employed by respondent unless there were posted an employment bond in an amount satisfactory to the Secretary to assure that respondent would meet its obligations under the PACA. The letter requested certain information from respondent so that the Secretary could determine an appropriate amount of bond. It also provided a notice that if Robert A. Ferwerda continued to be employed by respondent after 30 days from the receipt of the letter without the posting of a required bond and getting the approval of the Secretary, the license of respondent could be in danger. The letter stated:

Gentlemen:

According to the records of the Department, there have been several reparation awards issued under the Perishable Agricultural Commodities Act against Four Seasons Wholesale Produce, Pompano Beach, Florida. These awards have not been satisfied.

The records of the Department show that Robert A. Ferwerda was the individual owner of Four Seasons Wholesale Produce. It is our understanding that Mr. Robert A. Ferwerda is currently employed by you.

Section 8(b) of the Act provides that when a reparation order is issued against a person and remains unpaid, no licensee can employ any such person for a period of two years from the date of such order except with the approval of the Secretary.

Before the Department will approve of the continued affiliation with the firm, it will be necessary for you to furnish a surety bond in an amount satisfactory to the Secretary. In order to determine the amount of bond to be posted, the following information should be furnished:

1. Approximate value of your produce transactions in fresh or frozen fruits and vegetables during an average month;
2. The percentage of business that is handled on consignment or joint account;
3. The amount of credit that is incurred;
4. A detailed description of the duties and responsibilities performed by Mr. Ferwerda in conducting your business.

In this description, advise if he will perform his duties only at your headquarters' office. If not, state the extent of time he will be at other locations;

5. The extent of supervision he will receive and under whose supervision he will perform his duties at any location;
6. The title or position he holds;
7. The salary or compensation he will receive.

Pursuant to Section 8(b) of the Act, notice is hereby given that after thirty days from the receipt of this letter, you cannot continue the employment unless the approval of the Department has been obtained. To continue such employment after that date without posting the required bond and obtaining the approval of the Department could endanger your license.

Please let us know what you intend to do about the continued employment of Mr. Ferwerda by February 26, 1982.

10. (a) In an attempt to obtain a bond, respondent furnished the requested information to the Department by a letter dated February 25, 1982, which was received March 2, 1982. On April 15, 1982, a PACA employee telephoned Arend Ferwerda and advised that a bond in the neighborhood of \$100,000 would be required. Arend Ferwerda seemed shocked at the amount of the bond, and stated that Robert was not currently working for him. Arend Ferwerda further explained that Robert's reparation complaints might be satisfied within 3 months. Arend Ferwerda asked for a listing of the reparation awards and pending complaints against Robert Ferwerda.

(b) A letter listing the complaints and reparation awards against Robert Ferwerda was sent to Tri-County on April 15, 1982, the same day as the telephone conversation, and the Department's letter of April 15 concluded "Please keep us advised of your intentions." That letter was received by respondent on April 19, 1982. When respondent failed to keep the Department advised of his intentions, as requested in the Department's letter of April 15, 1982, the Department again wrote respondent on May 19, 1982, referring to the April 15 letter and stating "To date, we have not received a reply and again call this matter to your attention."

(c) On June 4, 1982, Arend Ferwerda wrote to the Department stating that he had not "received any definite amount of the employment bond," and asking questions as to the exact amount and nature of the required bond. In his letter of June 4, 1982, Arend Ferwerda stated:

Robert Ferwerda is not employed by us at this time. His last check for working was the week of March 25, 1982.

As soon as we can secure the above information and are able to obtain the bond we would like to re-employ him.

(d) On September 24, 1982, the Department wrote a letter to Arend Ferwerda advising him that a surety bond in the amount of \$125,000 is required to cover the employment of Robert Ferwerda. The letter enclosed a bond form and gave respondent additional information as to the nature of the bond. The letter concluded: "To employ Mr. Robert Ferwerda without meeting these requirements could endanger your license."

11. However, respondent did not file a bond and did not in fact terminate the "employment" of Robert A. Ferwerda prior to the hearing in this case. Instead, it kept Robert A. Ferwerda in its

"employ" under changed circumstances after March 25, 1982. Prior to March 25, 1982, Robert Ferwerda was receiving \$300 per week salary from respondent. Subsequently, his affiliation with respondent changed somewhat. He was no longer in charge of the hiring and firing of employees. However, he continued to make produce purchases on behalf of respondent up to the morning of the hearing (February 14, 1984). He stored accounts to Tri-County. He was given the function of managing a complex of offices, owned by his father, Arend Ferwerda, including the business space occupied by respondent. He was furnished an office upstairs from the actual space occupied by respondent, but Robert spent a great deal of his time in respondent's office. He often received produce during the early hours of the morning. He consulted with respect to special packaging needs of respondent, negotiated price adjustments, and made decisions as to whether produce should be accepted or rejected. He and his family continued to enjoy coverage under the group health insurance policy of respondent, and he was, indeed, the most heavily covered person under the group life insurance portion of the policy of Tri-County.

12. Around March 25, 1982, in consultation with his father, Arend Ferwerda, Robert Ferwerda incorporated a trucking business, Bob's Transfer Service. Under the name of Bob's Transfer Service, Robert Ferwerda picked up produce to be delivered from the local area around Pompano Beach to respondent. He delivered such produce to respondent. He frequently used trucks belonging to Tri-County for this purpose. He drew from Tri-County \$300 a week as an advance on the money he was earning for performing a pickup and delivery service of produce. Such amount was raised to \$500 per week approximately January 1, 1983. The \$300 amount was, of course, the same amount as he received as salary prior to March 25, 1982.

CONCLUSIONS

I.

A.

Section 8(b) of the Perishable Agricultural Commodities Act authorizes the Secretary to suspend or revoke the license of any licensee who, after notice, continues to "employ" any person against whom there is an unpaid reparation award issued within 2 years without furnishing and maintaining a surety bond satisfactory to the Secretary. Specifically, § 8(b) of the Act provides (7 U.S.C. § 499h(b), *emphasis added*):

- 3) *Unlawful employment of certain persons; restrictions; bond assuring compliance; approval of employment without bond; change in amount of bond; payment of increased amount; penalties*

Except with the approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person—

(1) *whose license has been revoked or is currently suspended by order of the Secretary;*

(2) *who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect; or*

(3) *against whom there is an unpaid reparation award issued within two years, subject to his right of appeal under section 499g(c) of this title.*

The Secretary may approve such employment at any time following nonpayment of a reparation award, or after one year following the revocation or finding of flagrant or repeated violation of section 499b of this title, if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary as assurance that such licensee's business will be conducted in accordance with this chapter and that the licensee will pay all reparation awards, subject to its right of appeal under section 499g(c) of this title, which may be issued against it in connection with transactions occurring within four years following the approval. The Secretary may approve employment without a surety bond after the expiration of two years from the effective date of the applicable disciplinary order. The Secretary, based on changes in the nature and volume of business conducted by the licensee, may require an increase or authorize a reduction in the amount of the bond. A licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and if the licensee fails to do so the approval of employment shall automatically terminate. The Secretary may, after thirty days notice and an opportu-

nity for a hearing, suspend or revoke the license of any licensee who, after the date given in such notice, continues to employ any person in violation of this section.

The terms "employ" and "employment" were defined by an amendment to the Act approved October 1, 1962, as follows (7 U.S.C. § 499a(10)):

(10) The terms "employ" and "employment" mean any affiliation of any person with the business operations of a licensee, with or without compensation, including ownership or self-employment.

The legislative history of the amendatory legislation adding those definitions states (H.R. Rep. No. 1546, 87th Cong., 2d Sess. 4 (1962)):

This section of the bill adds to the first section of the Perishable Agricultural Commodities Act definitions of "responsibility connected" and "employ" or "employment." These new definitions are necessary by reason of the rewriting of the provisions relating to sections 4(b), 4(c), and 8(b) of the act. These terms, although heretofore used in the act, were not defined. Their definition will give them specific meaning, thus avoiding possible confusion as to interpretations. The defining of "employ" and "employment" to include ownership or self-employment makes it clear that the provisions of section 8(b), as amended, apply to owners, as well as others employed in the business. To fail to include owners would defeat the whole purpose of this provision of the act. Heretofore the phrase used in connection with § 8(b) was "employ in a responsible position" and considerable difficulty has been encountered in delineating what constituted a responsible position.

B.

The Perishable Agricultural Commodities Act, as originally enacted in 1930, contained no provisions restricting the employment of a person whose license was suspended or revoked, or who failed to pay a reparation award. The first employment restrictions were added by an amendment adding § 8(b) approved August 20, 1937, which prohibited the employment "in a responsible position" of a person whose license was revoked or who was responsibly connected with a firm whose license was revoked. After 1 year following the revocation, such employment was permissible if a satisfactory bond was filed. The 1937 amendment provided (50 Stat. 725, 730 (1937)):

"(b) The Secretary may, after thirty days' notice and an opportunity for a hearing, revoke the license of any commission merchant, dealer, or broker who, after the date given in such notice, continues to employ in any responsible position any individual whose license was revoked or who was responsibly connected with any firm, partnership, association, or corporation whose license has been revoked. Employment of such individual by a licensee in any responsible position after one year following the revocation of any such license shall be conditioned upon the filing by the employing licensee of a bond, in such reasonable sum as may be fixed by the Secretary, or other assurance satisfactory to the Secretary that its business will be conducted in accordance with the provisions of this Act;

In 1956, the employment restriction was made applicable to a person whose license is suspended, or who was responsibly connected with a firm whose license is under suspension. The 1956 amendment to § 8(b) of the Act is as follows (70 Stat. 726, 727 (1956)):

"(b) The Secretary may, after thirty days' notice and an opportunity for a hearing, suspend or revoke the license of any commission merchant, dealer, or broker who, after the date given in such notice, continues to employ in any responsible position any individual whose license has been revoked or is under suspension or who was responsibly connected with any firm, partnership, association, or corporation whose license has been revoked or is under suspension. Employment of an individual whose license has been revoked or is under suspension for failure to pay a reparation award or who was responsibly connected with any firm, partnership, association, or corporation whose license has been revoked or is under suspension for failure to pay a reparation award after one year following the revocation or suspension of any such license may be permitted by the Secretary upon the filing by the employing licensee of a bond, of such nature and amount as may be determined by the Secretary, or other assurance satisfactory to the Secretary that its business will be conducted in accordance with the provisions of this Act;"

Since the Act had previously been amended in 1934 to provide for the automatic suspension of the license of a licensee who failed to pay a reparation award or file an appeal for judicial review (48 Stat. 584, 588 (1934); 7 U.S.C. § 499g(d)), the 1956 amendment made the Act more restrictive than the 1937 amendment, discussed

above, as to the employment of a person who had not paid a reparation award.

The legislative history of the 1956 amendatory legislation states (S. Rep. No. 2507, 84th Cong., 2d Sess. 4 (1956)):

Section 8(b) would authorize the Secretary to suspend the license of a person who employs in any responsible position an individual whose license is under suspension. In effect, this would place restrictions on suspended licensees comparable to those now in effect for revocations, and it would serve to eliminate the effectiveness of dummy organizations and other such devices that might be set up to circumvent the suspension penalty.

In 1962, § 8(b) of the Act was amended to contain the provisions presently in effect, which are set forth in § 1(A) of these conclusions (76 Stat. 673, 675-76 (1962); 7 U.S.C. § 499b(b)). The 1962 amendment makes the Act much more harsh, in one respect, with respect to the employment of a person who fails to pay a reparation award. Under the 1962 amendment, such a person cannot be employed in any capacity, without a bond, whereas the previous restrictions were applicable only to employment "in any responsible position." Moreover, at the same time that the employment restrictions were made more harsh, in this respect, the definitions of "employ" and "employment," discussed above, were added, defining employment as "any affiliation of any person with the business operations of a licensee, with or without compensation, including ownership or self-employment" (7 U.S.C. § 499a(10)).³

The legislative history of the 1962 amendatory legislation, which enacted the provisions of § 8(b) presently in effect, states (H.R. Rep. No. 1546, 87th Cong., 2d Sess. 8 (1962)):

Section 11 amends section 8(b) of the act to clarify and make more effective the provisions of the act with respect to employment by licensees of persons who have been found to have violated the act or failed to pay reparation awards under the act, as well as persons responsibly connected with such persons. It prohibits the employment of these persons by a licensee without the approval of the Secretary and prescribes standards with respect to the conditions for such approval, authorizing the approval of such employment upon the furnishing and maintaining of a

³ In another respect, the 1962 amendment realized the employment restrictions : to a person who failed to pay a reparation award since it eliminated the 1-year aiting period.

surety bond satisfactory to the Secretary as assurance that the licensee's business will be conducted in conformance with the act and all reparation awards paid. Employment under such conditions may be approved, with respect to unpaid reparation awards, at any time and, with respect to persons found guilty of flagrant or repeated violations of the act, after 1 year, with authority in the Secretary to approve employment of the latter persons without a surety bond after the expiration of 2 years. It is further provided that the Secretary may increase the amount of bond required and that failure to comply with his order in that regard shall result in automatic termination of approval. Any licensee hiring a person without the approval of the Secretary in violation of this provision, after notice and opportunity for hearing, may have his license suspended or revoked. At present the act applies only to the employment of a person in a responsible position. This has caused serious difficulties due to the problem of delineating what constitutes a responsible position under all circumstances and the difficulty of ascertaining the true nature of the employee's relationship with the licensee. Under the present provisions of the act the restrictions against employment are directed specifically to persons whose licenses had been revoked or suspended and persons responsibly connected therewith. The bill extends such restrictions to persons whose licenses could have been revoked or suspended if they had had active licenses. As amended, section 8(b) would prohibit employment of persons covered by it unless such employment is approved by the Secretary; whereas at present it prohibits such employment only after notice by the Secretary.

From the foregoing, it is clear that Congress regarded a person who fails to pay a reparation award as a defiled person who is likely to contaminate any licensee whose business operations he becomes affiliated with in any manner, with or without compensation, including ownership or self-employment. Congress prohibited any affiliation (with or without compensation) of such a defiled person with a licensee unless (i) the affiliation is approved by the Secretary, and (ii) the licensee furnishes a bond in form and amount satisfactory to the Secretary.

C.

The harsh "employment" (i.e., affiliation) restrictions involving a person who fails to pay a reparation award, discussed in §§ 1(A) and

(B), *supra*, are consistent with the general pattern of the Perishable Agricultural Commodities Act regulatory program. Severe sanctions are imposed against persons who fail to pay for produce, irrespective of what excuses they offer.

Failure to pay for produce is a very serious violation of the Perishable Agricultural Commodities Act which results in an order revoking the license of the offender⁴ since it is the "goal [of the Perishable Agricultural Commodities Act] that only financially responsible persons should be engaged in the perishable agricultural commodities industry,"⁵ and it is the policy of this Department to impose severe sanctions for serious violations of any of the regulatory programs administered by the Department to serve as an effective deterrent not only to the respondents but also to other potential violators.⁶ This policy has been followed in all of the Department's disciplinary proceedings in recent years.

⁴ *E.g.*, *In re Cuttous*, 44 Agric. Dec. ____ (Aug. 20, 1985); *In re Farm Market Service Inc.*, 44 Agric. Dec. ____ (Jan. 8, 1985); *In re Clarence Miller Co.*, 43 Agric. Dec. ____ (Apr. 18, 1984); *In re Gilardi Truck & Transportation, Inc.*, 43 Agric. Dec. ____ (Jan. 27, 1984); *In re Jarcos Produce Farms, Inc.*, 42 Agric. Dec. ____ (Oct. 6, 1983); *In re Emons Potato Co.*, 42 Agric. Dec. 408, 410 (1983); *In re Old Virginia, Inc.*, 42 Agric. Dec. 270, 272 (1983); *In re Melain Beane Produce Co.*, 41 Agric. Dec. 2422, 2425 (1982); *aff'd*, 728 F.2d 347 (6th Cir. 1984); *In re Carlton P. Stowe, Inc.*, 41 Agric. Dec. 1116, 1126 (1982), appeal dismissed, No. 82-4144 (2d Cir. Oct. 13, 1982); *In re Wayne Cusi-mano, Inc.*, 40 Agric. Dec. 1154, 1156-58 (1981), *aff'd*, 692 F.2d 1025 (5th Cir. 1982); *In re Mel's Produce, Inc.*, 40 Agric. Dec. 792, 793 (1981); *In re United Fruit & Vegetable Co.*, 40 Agric. Dec. 396, 401-02 (1981), *aff'd*, 658 F.2d 983 (8th Cir.), cert. denied, 456 U.S. 1007 (1982); *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 112 (1981), *aff'd* mem., No. 81-1446 (D.C. Cir. Jan. 19, 1982), printed in 41 Agric. Dec. 89 (1982); *In re Baltimore Tomato Co.*, 39 Agric. Dec. 412, 414-15 (1980); *In re Hal Mardler Produce, Inc.*, 37 Agric. Dec. 808, 811-12 (1978); *In re Salt*, 35 Agric. Dec. 721, 723, 726 (1976); *In re Cotanzaro*, 35 Agric. Dec. 31, 30-35 (1976), *aff'd*, No. 76-1613 (5th Cir. Mar. 9, 1977), printed in 36 Agric. Dec. 467; accord *In re Kaftash*, 39 Agric. Dec. 581, 586-87 (1980), *aff'd* (unpublished), 678 F.2d 1329 (6th Cir. 1981), reprinted in 41 Agric. Dec. 88 (1982).

⁵ *Marcus Trogosh Co. v. USDA*, 524 F.2d 1255, 1257 (5th Cir. 1975); accord *Childs v. Guerin*, 443 F.2d 684, 688-89 (6th Cir. 1971); *Zotich v. Freeman*, 373 F.2d 110, 117 (2d Cir.), cert. denied, 389 U.S. 835 (1967); *In re Melain Beane Produce Co.*, 41 Agric. Dec. 2422, 2425 (1982), *aff'd*, 728 F.2d 347 (6th Cir. 1984); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1168 (1982), *aff'd*, 708 F.2d 774 (D.C. Cir. 1983); *In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1133 (1981); *In re Mel's Produce, Inc.*, 40 Agric. Dec. 792, 793 (1981); *In re United Fruit & Vegetable Co.*, 40 Agric. Dec. 395, 402 (1981), *aff'd*, 658 F.2d 983 (8th Cir.), cert. denied, 456 U.S. 1007 (1982); *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 112 (1981), *aff'd* mem., No. 81-1446 (D.C. Cir. Jan. 19, 1982), printed in 41 Agric. Dec. 89 (1982).

⁶ Section 8(a) of the Act provides (7 U.S.C. § 490(a)):

§ 490h. Grounds for suspension or revocation of license

(a) Authority of Secretary

The basis for the Department's severe sanction policy is set forth at great length in numerous decisions, e.g., *In re Worsley*, 33 Agric. Dec. 1547, 1556-71 (1974),⁷ which is set forth as an appendix to this decision.⁸ The Department's sanction policy is also discussed at length in *In re Esposito*, 38 Agric. Dec. 618, 624-65 (1979).

"Failure to pay violations not only adversely affect the party who is not paid for produce, but such violations have a tendency to snowball. 'On occasions, one licensee fails to pay another licensee who is then unable to pay a third licensee.' This could have serious repercussions to producers, licensees and consumers."⁹

Whenever (a) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title . . . the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

⁷The Department's severe sanction policy did not originate with *Worsley*, but, rather, was mentioned briefly in the first decision issued by the present Judicial Officer, *In re Henner*, 30 Agric. Dec. 1151, 1263-64 (1971), and was further developed in numerous other decisions before it was finalized in *In re Miller*, 38 Agric. Dec. 53, 64-69 (1974), *aff'd per curiam*, 498 F.2d 1088 (5th Cir. 1974).

⁸Severe sanctions issued pursuant to the Department's severe sanction policy were sustained, e.g., in *In re Collier*, 38 Agric. Dec. 967, 971-72 (1979), *aff'd per curiam* (unpublished), 624 F.2d 190 (9th Cir. 1980); *In re Gold Bell-J & S Jersey Farms, Inc.*, 37 Agric. Dec. 1816, 1862-63 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980); *In re Muehlenthauser*, 37 Agric. Dec. 313, 320-32, 327-52, *aff'd mem.*, 590 F.2d 340 (8th Cir. 1978); *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547, 549-51 (1977), *aff'd sub nom. Van Wyk v. Bergland*, 570 F.2d 761 (8th Cir. 1978); *In re Cordale Livestock Co.*, 34 Agric. Dec. 1114, 1133-34 (1977), *aff'd per curiam* (unpublished), 575 F.2d 879 (5th Cir. 1978); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1551 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Catanzaro*, 35 Agric. Dec. 25, 31-32 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 38 Agric. Dec. 467; *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 713, 759, 801 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1975); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 759, 762 (1975), *aff'd* 549 F.2d 836 (D.C. Cir.), *cert. denied*, 484 U.S. 920 (1977); *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 171, 178, *aff'd per curiam*, 524 F.2d 977 (4th Cir. 1975); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 133, 145-60, *aff'd per curiam*, 524 F.2d 977 (4th Cir. 1975); *In re Marvin Dragosh Co.*, 38 Agric. Dec. 1884, 1913-14 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975); *In re Trenton Livestock, Inc.*, 38 Agric. Dec. 490, 515, 539-50 (1974), *aff'd per curiam* (unpublished), 510 F.2d 966 (4th Cir. 1975); *In re Miller*, 38 Agric. Dec. 53, 64-80, *aff'd per curiam*, 498 F.2d 1088, 1089 (5th Cir. 1974).

⁹*In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2426 (1982), *aff'd*, 728 F.2d 347 (6th Cir. 1984); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1169 (1982), *aff'd*, 708 F.2d 774 (D.C. Cir. 1982); *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 114 (1981), *aff'd mem.*, No. 81-1448 (D.C. Cir. Jan. 19, 1982), *printed in* 41 Agric. Dec. 89 (1982); *accord In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1134 (1981). Although the Act is primarily to protect producers, it "is also for the protection of consumers"

Continued

If the violator who fails to pay for produce does not have a license in effect, an order is issued finding that the person has engaged in repeated or flagrant violations of the Act,¹⁰ which has the same effect on the violator and on persons responsibly connected with the violator as a license revocation.¹¹

Specifically, as a result of a finding that a firm has committed flagrant and repeated violations of the Act, the firm cannot again become licensed under the Act for 2 years after the effective date of the Order issued in the case (7 U.S.C. § 499d(b); see, also, 7 U.S.C. § 499d(c)). Similarly, the persons "responsibly connected" with the firm cannot be licensed under the Act for 2 years (7 U.S.C. § 499d(b); see, also, 7 U.S.C. § 499d(c)); and they cannot work for another licensee under the Act for 1 year (7 U.S.C. § 499h(b)). After 1 year, the Secretary may approve their employment by another licensee if the licensee furnishes a satisfactory bond; after 2 years the Secretary may approve their employment by another licensee without a bond (7 U.S.C. § 499h(b)).

(H.R. Rep. No. 1195, 84th Cong., 1st Sess. p. 21, inasmuch as increased industry cost resulting from failures to pay or other unfair practices are ultimately borne by consumers." *In re Citrusware*, 35 Agric. Dec. 26, 33 (1976), *aff'd*, No. 76-1613 (8th Cir. Mar. 9, 1977), printed in 36 Agric. Dec. 467.

¹⁰ E.g., *In re Ransom Produce, Inc.*, 44 Agric. Dec. — (Aug. 26, 1985); *In re Veg Mix, Inc.*, 44 Agric. Dec. — (Aug. 21, 1985), appeal docketed, No. 85-1771 (D.C. Cir. Nov. 22, 1985); *In re A. Pellegrino & Sons, Inc.*, 44 Agric. Dec. — (Aug. 21, 1985), appeal docketed, No. 85-1590 (D.C. Cir. Sept. 19, 1985); *In re Food Marketers, Inc.*, 44 Agric. Dec. — (Aug. 20, 1985); *In re Oliveria, Jackson, Oliveria, Inc.*, 42 Agric. Dec. — (Aug. 31, 1983); *In re Bonanox, Inc.*, 42 Agric. Dec. 588 (1983); *In re Melvin Boone Produce Co.*, 41 Agric. Dec. 2422, 2426 (1982), *aff'd*, 738 F.2d 347 (8th Cir. 1984); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1165-62 (1982), *aff'd*, 708 F.2d 774 (D.C. Cir. 1983); *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 748 (1982); *In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1133-34, 1151 (1981); *In re C.B. Foods, Inc.*, 40 Agric. Dec. 961, 968-71 (1981), *aff'd* *enovo*, 631 F.2d 804 (3rd Cir. 1982), cert. denied, 103 S.Ct. 79 (1982); *In re Kafkash*, 39 Agric. Dec. 683, 686-87 (1980), *aff'd* (unpublished), 673 F.2d 1329 (8th Cir. 1981), reprinted in 41 Agric. Dec. 88 (1982); *In re John H. Norman & Sons Distrib. Co.*, 37 Agric. Dec. 705, 714-21 (1978); *In re Fayos Produce, Inc.*, 36 Agric. Dec. 684, 694-95 (1977); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1633, 1643-45 (1976), *aff'd* *per curiam* (unpublished), 568 F.2d 772 (4th Cir.), cert. denied, 439 U.S. 819 (1978); *In re King Midas Packing Co.*, 34 Agric. Dec. 1879, 1885-89 (1975); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 748-52 (1975), *aff'd*, 549 F.2d 830 (D.C. Cir.), cert. denied, 434 U.S. 920 (1977); *In re Marvin Thugash Co.*, 33 Agric. Dec. 1584, 1590-1914 (1974), *aff'd*, 524 F.2d 1256 (5th Cir. 1975); *In re George Streiberg & Son, Inc.*, 32 Agric. Dec. 236, 253, 266-70 (1973), *aff'd*, 491 F.2d 988 (2d Cir.), cert. denied, 419 U.S. 530 (1974).

¹¹ *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 748-49 (1982); *In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1151-52 (1981); *In re John H. Norman & Sons Distrib. Co.*, 37 Agric. Dec. 705, 714-15 (1978); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 750-51 (1975), *aff'd*, 549 F.2d 830 (D.C. Cir. 1977), cert. denied, 434 U.S. 920 (1977).

In *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 781-82 (D.C. Cir. 1983), the court held that the Judicial Officer properly interpreted the Act in refusing to consider excuses for failure to pay in determining whether payment violations occurred or whether they were willful, stating:

The petitioner argues that the Judicial Officer improperly refused to consider various "mitigating factors" that, according to it, should have been viewed as excusing its failure to pay its debts. These include the allegedly relatively small amount the petitioner owed, the absence of previous violations by the petitioner, and the lack of "devious or dishonest practices by the petitioner." In refusing to consider these factors, the Judicial Officer pointed out that "it has repeatedly been held under the Act that all excuses are routinely rejected in determining whether payment violations occurred or whether violations were willful since 'the Act calls for payment—not excuses.'" *Quoting In re Kafcsak*, 39 Agric. Dec. 683, 686 (1980). See also *In re Carlton F. Stowe, Inc.*, 41 Agric. Dec. 1116, 1129 (1982).

The Judicial Officer properly interpreted the Act. Section 2(4), 7 U.S.C. § 499b(4) (1976), is unequivocal. It makes it unlawful for a licensee to "fail or to refuse . . . to . . . make full payment promptly." As Congress noted in amending the Act in 1956, "The Perishable Agricultural Commodities Act is admittedly and intentionally a 'tough' law." S.Rep. No. 2507, 84th Cong., 2d Sess. (citing H.Rep. No. 1196, 84th Cong., 1st Sess.), reprinted in 1956 U.S. Code Cong. & Ad.News 3699, 3701. The Secretary explained the reason for this strict requirement in *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 114 (1981), *aff'd mem.* 41 Agric. Dec. 89 (D.C. Cir. No. 81-1446, Jan. 19, 1982):

Failure to pay violations not only adversely affect the party who is not paid for produce, but such violations have a tendency to snowball. "On occasions, one licensee fails to pay another licensee who is then unable to pay a third licensee." This could have serious repercussions to producers, licensees and consumers.

Quoting In re John H. Norman & Sons Distrib. Co., 37 Agric. Dec. 705, 720 (1978).

In sum, the "goal of the [Perishable Agricultural] Commodities Act [is] that only financially responsible persons should be engaged in the businesses subject to the Act." *Zwick v. Freeman*, 373 F.2d 110, 117 (2d Cir.), cert. denied, 389 U.S. 835, 88 S. Ct. 43, 19 L.Ed.2d 96 (1967) quoted in *Marvin Tragash Co. v. United States Dep't of Agric.*, 524 F.2d 1255, 1257 (5th Cir. 1975).

The strict policy of the Secretary that all excuses for nonpayment are disregarded furthers this goal. Under the Act a licensee is required to conduct his business in a manner that insures that he pays his bills fully and promptly. If he fails to do so, he violates the Act. For this reason, alleged mitigating circumstances are irrelevant.

In a Congressional report as to the 1962 amendments to the Act discussed above in § 1(B), it is stated (H.R. Rep. No. 1546, 87th Cong., 2d Sess. 3 (1962)):

Testimony of the shippers, brokers, wholesalers, and other elements of the trade in fresh and frozen fruits and vegetables who have been operating under this act is enthusiastically and almost unanimously in its support. It has brought a high degree of stability and responsibility to an industry which had frequently been beset by instability and irresponsibility. It is regarded as one of our most successful regulatory programs.¹²

Congress further recognized the peculiar vulnerability of producers of perishable agricultural commodities, and the importance of the Department's regulatory programs to assure payment for these commodities, in the recent 1978 Bankruptcy Act amendments, in which it is provided that disciplinary sanctions may be issued under the Perishable Agricultural Commodities Act for failing to pay for produce where there has been a bankruptcy. The Bankruptcy Act provides (11 U.S.C. § 525):

§ 525. *Protection against discriminatory treatment*

Except as provided in Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499a-499e), the Packers and Stockyards Act, 1921 (7 U.S.C. 181-229), and section 1 of the Act entitled "An Act making appropriations for the Department of Ag-

¹² *Accord Birkenfeld v. United States*, 369 F.2d 491, 494 (3d Cir. 1966); *In re Co-Jumbus Fruit Co.*, 40 Agric. Dec. 103, 114 (1981), *aff'd mem.*, No. 81-1446 (D.C. Cir. Jan. 19, 1982), printed in 41 Agric. Dec. 99 (1982).

riculture for the fiscal year ending June 30, 1944, and for other purposes," approved July 12, 1943 (57 Stat. 422; 7 U.S.C. 204),¹³ a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

II.

It is the consistent practice of the Judicial Officer to give great weight to the findings by Administrative Law Judges since they have the opportunity to see and hear the witnesses testify.¹⁴ However, in some circumstances, the Judicial Officer has reversed as to the facts, particularly where documentary evidence or inferences to be drawn from the facts are involved.¹⁵

¹³ This is an Act supplementing the Packers and Stockyards Act.

¹⁴ E.g., *In re King Meat Packing Co.*, 40 Agric. Dec. 562, 563 (1981); *In re Thorum*, 38 Agric. Dec. 1425, 1426-28 (remand order), *final decision*, 38 Agric. Dec. 1533 (1979) (affirming Judge Baker's dismissal of complaint where she accepted the testimony of respondent's wife, respondent's employee, and respondent's "real good friend" over that of three disinterested USDA veterinarians); *In re Unionville Sales*, 38 Agric. Dec. 1207, 1208-09 (1979) (remand order); *In re National Beef Packing*, 36 Agric. Dec. 1721, 1736 (1977), *aff'd*, 605 F.2d 1167 (10th Cir. 1979).

¹⁵ E.g., *In re Gold Bell-I & S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1347 (1978) *yd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980); *In Muchlenhauer*, 37 Agric. Dec. 312, 330, *aff'd mem.*, 500 F.2d 340 (8th Cir. 1973); *I. M. & H. Produce Co.*, 34 Agric. Dec. 700, 713-56 (1975), *aff'd*, 549 F.2d 810 (11th Cir.), *cert. denied*, 434 U.S. 920 (1977). also, see, *FCC v. Allentown Broadcasting Co.*, 9 U.S. 358, 364-65 (1955); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 492-1 (1951); *Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 26 (Continued)

In the present case, it is not necessary to squarely disagree with the ALJ's findings since she found and concluded that Robert Ferwerda's "activities do indicate a minimum association or affiliation with the Respondent corporation, but not of the flagrant or deliberate type" (Initial Decision at 35). That is all that is necessary to constitute "employment," as defined in the Act. "Employment" includes "any affiliation of any person with the business operations of a licensee, with or without compensation" (see § 1(A), *supra*, emphasis added). The word "any" is a broad and comprehensive term (*United States v. Rosenwasser*, 323 U.S. 360, 382-63 (1945); *FDIC v. Winton*, 131 F.2d 780, 782 (6th Cir. 1974); *Kuhlman v. W.A. Fletcher Co.*, 20 F.2d 465, 468 (3d Cir. 1927)) that includes *all* kinds of affiliation—whether minimum or maximum; whether deliberate or not.

The ALJ further found (Initial Decision at 22):

58. Unknowingly, the Respondent violated the Act, as interpreted and administered by the Complainant, but this was not wilful, and was caused more by the actions of Bob Ferwerda, rather than the Respondent.

Since complainant interprets the Act in accordance with the statutory definition referred to in § 1(A), *supra*, the ALJ's findings and conclusions actually support my findings and conclusions that respondent continued to "employ" Robert Ferwerda after respondent received notice that to continue such employment after March 21, 1982, could endanger its license.

The admissions of Robert Ferwerda and the testimony of five trade witnesses prove conclusively that respondent continued to "employ" Robert Ferwerda after receiving the Department's notice.¹⁸ For example, Mark Levigne testified that he sold mushrooms to respondent for Florida Mushroom, and that "Bob Ferwerda" (i.e., Robert Ferwerda) was the only person at Tri-County who gave him the orders, or who decided whether the quantity or quality was acceptable. Specifically, he testified (Tr. 437-41):

285-95 (1982); *Southern Nat'l Mfg. Co. v. EPA*, 470 F.2d 194, 197 (6th Cir. 1972); *Retail, Wholesale & Dept. Store Union v. NLRB*, 465 F.2d 350, 387 (D.C. Cir. 1972); *OKC Corp. v. FTC*, 455 F.2d 1150, 1162-63 (10th Cir. 1972); *Nix v. NLRB*, 418 F.2d 1001, 1005 (5th Cir. 1969); *Jay Silk Mills, Inc. v. NLRB*, 185 F.2d 732, 742 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951); *Davis, Administrative Law Treatise*, § 10.04 (1958 & 1970 Supp.).

¹⁸ Complainant need only prevail by a preponderance of the evidence. See *Harman & MacLean v. Haddleton*, 459 U.S. 375, 387-92 (1982); *Steadman v. SEC*, 459 U.S. 91, 92-104 (1981); *In re Rowland*, 40 Agric. Dec. 1934, 1941 n.5 (1981), *aff'd*, 713 F.2d 179 (5th Cir. 1983); *In re Gold Bell-J & S Jersey Farms, Inc.*, 87 Agric. Dec. 1245, 1246 (1978), *aff'd*, No. 78-3124 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980).

Q. August, 1983, to the present, you've been with Florida Mushroom; is that not true?

A. Yes.

Q. What are your duties with Florida Mushroom?

A. There again, I'm a truck driver. I have all the same duties. I might be going in as office manager in a few weeks.

Q. Do you, in fact, still sell mushrooms to customers?

A. Yes, I still do all the same things.

Q. Have you had occasion to call Tri-County?

A. Every day.

Q. Every day you've called Tri-County?

A. Yes.

Q. Are you the representative who calls Tri-County for Florida Mushroom? Does anybody else?

A. When I'm out sick or I'm on the road, somebody else will do it.

Q. When you call Tri-County, who will you talk to?

A. Bob.

Q. Is that Bob Ferwerda?

A. Yes.

Q. And do you talk to anybody else?

A. Well, I try . . . Well, nobody else gives an order. I talk to other people but nobody else gives an order.

Q. If you try to give an order to somebody else what happens?

A. Well, if I try to give one, nobody else really knows.

Q. Do they, then call someone else to call you back?

A. Well, Bob calls me back.

Q. Bob calls you back? And do you deliver any mushroom to Florida Mushroom?

A. I work for Florida Mushroom.

Q. Excuse me, Tri-County?

A. Yes.

Q. How many times?

A. Between four and six times a week.

Q. Almost every day?

A. Yes.

Q. You're the primary deliverer?

A. In Broward County.

Q. And do you unload the truck yourself?

A. Myself.

Q. And what time do you do that?

A. 5:00, quarter to 5:00. 5:30 o'clock in the morning.

Q. Is that right? And who do you see?

A. Again, the receivers on the dock.

Q. Is Bob ever there?

A. Yes, Bob's there.

Q. Every day?

A. Yes, every day.

Q. And what happens with the questions in respect to quantity or quality?

A. Again, it's up to Bob what they keep or send back.

Q. Do you have discussion with him?

A. Yes.

Q. And when is the last time you saw Bob at Tri-County?

A. I'd say this morning. This morning I was late. I'd say 5:30 o'clock.

Q. 5:30 o'clock this morning? Did you talk with Bob?

A. No, this morning I didn't.

Q. There were no problems?

A. No problems.

Q. When is the time before that you saw him?

A. Yesterday morning.

Q. And did you talk to him yesterday morning?

A. Yes.

Q. What did you talk to him about?

A. It was a quarter to 5:00 o'clock when I got there. He was the only one there and so he asked me to leave the mushrooms there and he couldn't sign the ticket.

Q. What? He couldn't sign the ticket?

A. That's what he said.

Q. Did you ask him?

A. He said: You can leave the mushrooms here but I couldn't sign the ticket. So in that case I signed it.

Q. What do you mean, you signed it?

A. I signed it to show that they were delivered.

Q. You mean that you signed it to show that you had delivered it? Does that happen frequently?

A. Yes. A lot of my stops . . .

Q. Have you had any other instances when you stopped at Tri-County when nobody has been there but Bob?

A. Yes.

Q. How often does that happen?

A. Not too often.

Q. And when it does, what happens with respect to the invoices or sales tickets.

A. I sign it.

Q. Now, normally when you go to Tri-County and somebody other than Bob is there to receive it, is the sales ticket signed by those people?

A. Yes.

Mark Levigne further testified that Robert Ferwerda's activities for Tri-County were the same when Mark Levigne previously

worked for New Garden Supply and C&G Mushroom (Tr. 429-37). He testified (Tr. 435):

Q. What if there were a disagreement [at Tri-County] as to the quantity of the mushrooms. What would happen?

A. Well, that's happened a couple of times.

There was a disagreement about the quality or the quantity then the receiver would always go get Bob [i.e., Robert Ferwerda] to either reject it, tell me something about it, or something to that nature.

Q. So you talked to Bob about it if there was a discrepancy?

A. Yes.

Similar testimony was given by Terrance Polcyn, who worked for C&G Mushroom and New Garden Supply. He testified that he talked to Robert (Bob) Ferwerda as to respondent's orders for mushrooms, and that Robert Ferwerda would resolve any discrepancies as to mushrooms (Tr. 355-425). Mr. Polcyn testified (Tr. 364-07, 429):

Q. Now, during the period June, 1982, through December, 1982, did you have occasion to sell mushrooms to C&G. Sorry, beg your pardon, to Tri-County Wholesale Produce Company?

A. Yeah, we dealt with Tri-County.

Q. Did you initiate phone calls to Tri-County?

A. Yes, sir.

Q. Did Tri-County initiate phone calls to you?

A. Yes, sir.

Q. Were the phone calls initiated by Tri-County to you for the purpose of purchasing mushrooms?

A. Yes, sir.

Q. Who called you?

A. Bob Ferwerda.

Q. How do you know it was Bob Ferwerda?

A. Since the initial meeting and contact over the long period of time, I know his voice on the phone and I know him personally.

Q. And how many times were you called during that six months period, approximately?

A. I couldn't even say. It was numerous conversations. Whether I would initiate the call or Mr. Ferwerda. Mainly would initiate calls to that office.

Q. Approximately how many sales a week did C&G Mushroom make to Tri-County.

A. Probably two or three. We would go into the market at least five times a week.

Q. Two or three sales of mushrooms a week?

A. Yes.

Q. In that respect, sir, did you ever deal with anybody else in the sale of mushrooms to Tri-County from June, 1982, through December, 1982, other than Bob Ferwerda.

A. I had talked to other people, the girls, the secretary in regard to orders and things like this, the yes or no would come from Bob Ferwerda.

Q. When you talked to other people in the business, what happened?

A. Well, they would—if Mr. Ferwerda wasn't in, I'd call back, or he would return my call.

Q. And if he were in, what would they do?

A. I'd talk to him.

Q. Did they refer you to him?

A. Yes, sir.

Q. I see. Did you go down to the place of business at Tri-County from June, 1982 to December, 1982?

A. Yes.

Q. And who did you see when you were there?

A. Bob Ferwerda.

Q. What time of the day, sir?

A. Various times, early morning. I'd generally try to get there before 11:00 o'clock.

Q. And what would Bob Ferwerda be doing?

A. Just working.

Q. What do you mean by just working? Describe specifically.

A. Sitting at the desk or answering the phone.

Q. Sitting at what desk? Can you describe the place of business?

A. Yes. Well, you have your loading platform. Facing the building off to the left is a small office.

Q. Is that in the front or the back of the building?

A. The front of the building.

Q. Is that where he was sitting? In that office?

A. Yeah. It was an office with a couple of chairs and one desk. Maybe two desks, but there would be one desk facing the door, which is where he sat.

Q. I see. If you had any problems who did you talk to?

A. Mr. Ferwerda.

Q. If you had problems with respect to quantity of mushrooms delivered; with whom did you speak?

A. Mr. Ferwerda.

Q. If you had problems with respect to quality of mushrooms; with whom did you speak?

A. Mr. Ferwerda. In regard to exchange of mushrooms or any monetary difference or anything it would be--other people would maybe call and say the product's not as good or this or that, but basically, in regard to getting a business decision, it would be Mr. Ferwerda.

A. I know that's the gentleman over there. I believe I met him one time.

Q. Did you ever deal with Arend Ferwerda?

A. No, sir.

* * * * *

A. The only—on payment, if there was a discrepancy in regard to—a controversy on how many were ordered and how many were delivered or quality or price cutting, it would have to go and be initialed by Bob before the bookkeeper would pay it. In other words he would have the say so into whether it would be paid as invoiced or as lower.

Harold Brick, sales manager for Central American Produce Company, signed an affidavit written in his own handwriting on March, 1983, in which he states that "I have been selling Tri County produce thru Bob Ferwerda from December 1982 to March 1983 along from Central America" (CX 1). His testimony supports his affidavit (Tr. 13-30). He testified (Tr. 14-15):

Q. I ask you to reflect upon the period of time from January, 1982, through December, 1982. Did your business have occasion to sell goods to a company known as Tri-County Wholesale Produce, Incorporated?

A. The dates I don't remember but we did do business with Tri-County.

Q. In 1982, sir?

A. I really don't remember the dates, the years.

Q. I'd like to show you a document that you signed and ask if this will refresh your recollection?

A. If I made a statement and signed it, then it was the fact then.

* * * * *

Q. Have you read the statement that you've been handed, sir?

A. Yes, I have.

Q. Do you recognize it?

A. Yes.

Q. And what is it?

A. It's a statement of December 12, '82 to March, '83.

Q. And does that refresh your recollection with regard to sales to Tri-County Produce?

A. Yes. If I signed that, and I did, then that was the case at the time. That was over a year ago.

Q. Now, sir, with whom did you deal in Tri-County?

A. Bob Ferwerda.

Q. And do you recognize Bob Ferwerda when you see him?

A. Yes, I do.

* * * * *

Mr. McCARRON: We'll stipulate as to Bob Ferwerda. It is the Bob Ferwerda that we're here about.

Frederick Rohlfing, owner of Jet Fresh Produce, signed an affidavit on March 23, 1983, written in his own handwriting in which he states that he sold produce to Tri-County Produce which was ordered by "Bob" (Cx 3). His testimony supports his affidavit (Tr. 46-56). He testified (Tr. 48-49):

Q. Think back in your dealing with Tri-County Produce. Who did you talk to in that business, that place of business?

A. The person who would call me for the order.

Q. Did somebody call you?

A. Well, sometimes call or . . .

Q. Sometimes he called you? Or sometimes you?

A. No, I never called him.

Q. Who would that person be?

A. I had Bob Ferwerda call me.

Q. How do you know it was Bob Ferwerda?

A. Well, I've met him before.

Mr. BECKER: Will counsel stipulate that it was Bob Ferwerda?

Mr. McCARRON: Yes.

BY MR. BECKER:

Q. Did you sell to Tri-County Wholesale Produce Company in 1983?

A. In the beginning of the year.

Q. And with whom did you deal?

A. With Bob.

Q. With Bob Ferwerda?

A. Yes.

Q. How do you know it was Bob Ferwerda?

A. Well, he was there in person.

Q. Okay. How about from July 1st, 1982 to December 31, 1982, with whom did you deal?

A. In '82 with Bob Ferwerda.

Q. How about January 1, 1982 through June 30, 1982?

A. I'm sorry.

Q. January of '82 through June of '82?

A. Yeah. June of '82. I started doing business in May of '82 so before then—it couldn't have been before May.

Q. It couldn't have been before May?

A. Yes, it couldn't have been.

Q. Did you ever deal with anybody else from Tri-County Wholesale other than Bob Ferwerda?

A. Sometimes a driver would come by and pick up an order.

Q. How about on the telephone, in terms of selling things to that company?

A. Did anybody else besides Bob call me?

Q. Yes, sir.

A. I don't believe so. Maybe the driver would have called me somewhere in the market and told me to save some-

thing for him, something like that. I get a call from the driver or from him telling me to hold it.

On March 22, 1983, Guy Romagni, a salesman for International A&G Produce Company, signed an affidavit written in his own handwriting stating that during the past 2 years to the present, he sold fresh fruits and vegetables to Tri-County through Robert Ferwerda (CX 2). At first his testimony fully supported his affidavit (Tr. 32-33), but he then had a lapse of memory as to the exact times when these transactions took place (Tr. 34-42).

Robert Ferwerda's testimony was quite evasive and contradictory, but along with his denials that he bought for Tri-County after March 25, 1982, were significant admissions that, in fact, he did deal with a number of suppliers on behalf of Tri-County in purchasing produce for Tri-County from the suppliers. In addition, he admitted that he gave his opinion to Roger, Tri-County's dock man, as to whether produce was of acceptable quality for retention by Tri-County. However, he stated that he was merely relaying orders from Roger or someone else to the suppliers, and that Roger made the actual decisions as to what produce should be kept by Tri-County. Examples of Robert Ferwerda's significant admissions are as follows:

[Tr. 107] Q. Have you ever had occasion to engage in the purchase or sell of produce in the year 1983 for Tri-County Wholesale Produce?

A. I don't understand exactly what you mean. Do you mean like buying a dozen bunches of dill when I was picking something else up?

Q. Did you pick up the telephone and call a produce house and say: Hi, this is Bob from Tri-County. I'd like to purchase whatever, or words to that effect?

A. What I would tell them when I would call them, I would say: This is Bob calling for Tri-County to pick up and I'd go down, look at the stuff and inspect it and bring it back.

* * * * *

[Tr. 109] Q. Did you ever make a purchase on behalf of Tri-County, on behalf of—

A. I told you: Yes, I did, sir. I bought dill for them. I might have bought coleslaw for them if they ran short of coleslaw or something like that.

* * * * *

[Tr. 111-13] Q. Did you ever while in the offices of Tri-county in 1983, did you ever receive calls from suppliers that were made to Tri-County?

A. I don't understand what you mean.

* * * * *

Q. Did you ever negotiate a purchase on behalf of Tri-county?

A. Back then I did. I can't say I didn't because I did. I saw I've done it. I know I've bought coleslaw.

* * * * *

Q. Yes, sir. Oh, no, back again for odds and ends. I want to be honest completely if I can; do you understand what I mean? And I have bought odds and ends.

Q. Did you ever talk with Harold Brick of Central American Produce with regard—with respect to the purchase of sale of produce in 1982?

A. Yes, sir.

* * * * *

Q. How about Guy Romagni?

A. Who?

Q. Of International A and G.

Q. What is his name?

A. I guess it's Guy Romagni.

Q. Oh, yes. I know Guy very well and I have picked up a lot of stuff for Tri-County up and through—I'm a hauler for Tri-County now.

Q. But you never negotiated a sale?

A. I have told them the stuff was no good. I wouldn't put it on the truck.

Q. You made that decision when you picked it up?

A. Because I wasn't going to haul it back to Pompano and have to haul it back to Miami for nothing.

* * * * *

[Tr. 122-23] Q. All right. And you say you didn't do any purchasing and selling other than an occasional purchase or sell after March 25th, 1982; isn't that true?

A. I said I didn't do any sales. I said I purchased occasional, like your colelaw or dill or odd item that they didn't have ready, lined up. I just knew where it was and it's always the same.

* * * * *

[Tr. 582-87] A. When I was told I couldn't work for my father anymore. Terry [Polcyn] and I are fairly good friends. Mark [Levigne], I know well enough. When he was having a baby I got to know him that way. His wife was having a baby. And so we got to talking about it on a personal basis, then on a last [first; see Tr. 568] name basis because the first time I heard his [last] name is when you mentioned it to me. But he asked me, he said, Bob, as long as you're not going to be with Tri-County and so on there are good accounts that pay all their bills on time. It's really a pleasure dealing with them. I would hate to take the chance on losing them. Would you represent me to your father and make sure we get the mushroom business. And I said I would do it, and I would talk to him and make sure that they got the business. I owe him a moral obligation. I owe the man. I don't owe him money legally, but I owe him \$81,000.

Q. So you would talk to your father. How often did you talk to your father about C & G Mushroom?

A. Primarily I talked to my father about C & G Mushroom just one time. And he said, Bob, he said, as long as you owe him a moral obligation do whatever you need to do to make sure that Terry is right, not right, but taken care of.

Q. Well, during the period March, 1982, to December, 1982, did Terry call you seeking business orders?

A. Yes, sir. He would call me up on the phone—well, it was either him or Mark would call me on the telephone almost every day. In fact it was, I would say it was every day. And I would tell them hold on. You know, he'd call up and ask for me on the phone. And I was there most of the time, so they would page me. I would talk to them and say, hey, how are you doing, Mark. How are you doing, Terry. What's going on today, and so on and so forth. And I'd put them on hold. I'd walk out on the dock. I'd say, Roger, it's C & G on the phone, which is the dock man over there. Said he'd like to know how many mushrooms that you need. And Roger would tell me what it was. I'd say, Terry, Mark, they need that many.

* * * * *

Q. And this was done on a regular basis, is that correct?

A. Yes, sir, I'd say at least five days a week, if not more.

Q. Now, there's testimony as to, from both Mr. Lavigne and Mr. Polcyn, that on, after C & G Mushroom ceased to exist it actually kind of became New Garden, and that was physically in December, 1982, and August, 1983. Did that same practice continue?

A. Yes, sir.

* * * * *

Q. Did you ever receive mushroom messages that either Terry or Mark would call you, and please call back?

A. Upon occasion, yes, sir.

Q. Did you ever make phone calls to either of those two individuals with respect to the mushrooms?

A. Yes, sir.

Q. Why?

A. Because they asked me to call them. And I thought it could be something for the flea market or they might want an order or something else.

Q. They might want an order? For whom?

A. For Tri-County.

Q. For Tri-County.

A. In other words, I was taking Tri-County's order to give it to Terry, to make sure it got placed where it was supposed to do, like he had asked me to do. It had become a habit over the years. I still talk to Mark on the phone now. If I'm there he'll call up and ask for Bob. And I'll say, how are you doing, Mark? What's going on today? What kind of mushrooms do you need? I'll say, I'll find out what Tri-County needs. And I walked out, asked Roger Roger, how many mushrooms do you need? Walked back in, Mark, they need this many mushrooms. It really sounds dumb. And I didn't think I was doing anything wrong for doing this.

* * * * *

A. The secretary always answered the phone.

Q. And would that secretary then seek to find you so that you could talk with either Mark or Terry?

A. They have a page system. And let's put it this way, the secretary is aware that I know Mark and Terry and we've been friends, and I enjoy talking to them.

Q. Now, eventually apparently Mr. Polcyn ceased [ceased] to work with mushrooms, but Mr. Lavigne went on working for Florida Mushroom Company. And I have found dates of August, 1983, to the present.

A. That's correct.

Q. Have you been dealing with Mark Lavigne since that time?

A. Yes, sir. Yes, sir, I have.

Q. And have you been entering into the same kind of arrangement with respect to the purchase of mushrooms by Tri-County by talking to him?

A. Yes.

Q. And do you see him on the dock in the mornings when he's delivering things?

A. Yes, sir.

Q. Do you ever have occasion to have a sales ticket or invoice handed to you?

A. Yes, sir. He handed it to me on several occasions. I said, Mark, you know I don't work for Tri-County; I'm not authorized to sign any tickets. And if you want to drop them put your ticket in the box of mushrooms. And when Roger gets here I'll tell him where it's at.

Q. Would you tell him you'd keep an eye on it.

A. Yes, sir.

* * * * *

[Tr. 593-96] Q. In dealing with Mark Lavigne on Florida Mushroom since August of 1983, or approximately that time, have you ever had occasion to be consulted by Mr. Lavigne or anybody affiliated with Tri-County concerning the quality of the mushrooms that were delivered?

A. I don't understand what you mean. In other words—rephrase that. I can't understand that.

Q. Let me try again. Remember since August of 1983 to whenever you stopped, or maybe to the present actually, and Mark Lavigne comes and delivers the mushrooms to Tri-County?

A. Yes, sir.

Q. Have questions ever been asked of you concerning whether they are acceptable because of quality problems?

A. Roger [Tri-County's dock man] would ask me at times, sir, yes, sir. And I'd look at him and I'd say, ah, Rog, come on. They ain't that bad. Go ahead and use them.

Q. Ah, Rog, come on. They look terrible, and you better tell him to take them back.

A. I tell you what, you don't tell Roger anything. When he makes up his mind it goes back.

Q. Did he ever say, hey, I got problems with these; what do you think, stuff like that?

A. Yes, sir. He did ask me. He asked my opinion.

Q. And you'd give him your opinion, would you not?

A. Yes.

Q. And was that also true with respect to both Mr. Polcyn and Mr. Lavigne with New Garden Supply from time to time?

A. Do you mean sending something back or whatever? Yeah, yeah. Giving your opinion as it goes to quality, yes, sir.

Q. And how about the C & G Mushroom, with respect to both Mr. Polcyn and Mr. Lavigne and whoever delivered?

A. The particular C & G, just the end of it, just before they were going out of business their quality was getting absolutely atrocious. In fact, I called Terry on a couple of occasions. I, I said, Terry, I can't recommend you anymore if you don't pick up this quality. I'm going to have to recommend to Roger that he go somewhere else because I can't put my reputation on the line for you sending garbage into this place.

* * * * *

The COURT: Just a moment, please, sir.

Mr. Ferwerda, if you were representing the individual whom we'll call Terry in these transactions to obtain his disposition of his mushrooms why would you be concerned with whether they were good mushrooms or not good mushrooms, inasmuch as if you represented Terry in an—why should you care whether Tri-County got some bad mushrooms?

The WITNESS: Because it's my father's business. I look after my father even more than I would Terry.¹⁷

¹⁷ Robert Ferwerda was clearly acting for Tri-County—not the suppliers—in ordering produce for, as Robert contends, relaying orders for produce. Robert testified (Tr. 75) that when Tri-County started business on August 1, 1961—

The first thing that I did was explain to the customers that we wanted to keep that Four Seasons was no longer in business. It was now—had become Tri-County Produce. Also explained to the people that I was buying for [from] that I was no longer buying for Four Seasons, Four Seasons was out of business. And explained to them I would try to pay them as quick as I could and if I could and so on, but I would be buying for Tri-County to help my father and so on. Robert Ferwerda's admissions prove that he continued to buy for Tri-County after March 26, 1962.

In view of Robert Ferwerda's strong bias in this case (i.e., he is the son of respondent's owner), I give more weight to the testimony of the trade witnesses than to that of Robert Ferwerda, notwithstanding the fact that the ALJ stated that Robert Ferwerda was a credible witness. But even if I were to accept Robert Ferwerda's version that he merely relayed information between Roger (Tri-County's dock man) and the suppliers as to Tri-County's produce needs, and that he merely gave his opinion to Roger as to what produce should be rejected, that would be sufficient affiliation with respondent's business operations to constitute "employment," as defined in the Act (see § 1(A), *supra*).

In addition, Robert Ferwerda's admitted trucking activities for respondent's business operations are sufficient, by themselves, to constitute "employment," as defined in the Act. Part of respondent's produce was delivered by the suppliers to respondent's place of business, but other produce was bought f.o.b. the suppliers' dock, making it respondent's responsibility to pick up the produce and deliver it to respondent's dock. About 20% to 35% of respondent's hauling was done by Robert Ferwerda, i.e., Bob's Transfer Service, under an arrangement with Arend Ferwerda (Tr. 646-47). About 70% to 75% of Bob's Transfer Service's trucking activities were for respondent (Tr. 100-01). Even though Bob's Transfer Service was an independent contractor in these transactions, this continuous, daily affiliation with respondent's business operations constitutes "employment," as defined in the Act.¹⁸

For the foregoing reasons, it is quite clear that respondent continued to "employ" Robert Ferwerda after he was notified that such employment without a bond could lead to the loss of respondent's license, and that such employment continued after the form complaint was issued in this case—even up to the time of the hearing in this proceeding!

III.

Respondent contends that no sanction can be imposed in this case because the administrative officials delayed too long in setting the exact amount of the required bond, and arbitrarily and capriciously set the bond at too high a level. This defense is an afterthought raised by respondent's present attorney. Respondent's original attorney filed an Answer and Affirmative Defenses on

¹⁸ We need not decide here whether a licensee that utilized Bob's Transfer Service on an occasional basis would be regarded as violating the "employment" restrictions. It is enough to decide here that the continuous, daily use of the trucking service of a restricted individual is sufficient "affiliation" with respondent's "business operations" to constitute "employment."

June 29, 1983, in which a number of affirmative defenses are forth, but nothing is said with respect to respondent's bond.

Respondent challenged the amount of the bond and the procedure in setting the bond for the first time in a prehearing statement filed November 8, 1983, by respondent's present attorney. Respondent's present attorney moved to amend the answer to incorporate affirmative defenses relating to the bond on January 1984, and the motion was granted on January 26, 1984, less than weeks before the hearing.

Even if respondent's criticism as to the bond were correct, it would not be a defense here.

First, as to the alleged delay in setting the bond amount, though the bond matter was first mentioned in the Department letter of February 18, 1982, and was not concluded until 7 months later, September 24, 1982, there are many intervening circumstances that explain much of the delay. In a telephone conversation on April 15, 1982, Arend Ferwerda stated that Robert was not currently working for him, and that the reparation complaints against Robert might be satisfied within 3 months (which would make bond unnecessary). The Department wrote to respondent on April 15, 1982, requesting respondent to "Please keep us advised of your intentions," but respondent failed to do so. After the Department reminded respondent on May 19, 1982, that it had not received reply to the April 15, letter, Arend Ferwerda replied on June 1982, that he would like to reemploy Robert as soon as he secure the additional information as to the bond and was able to obtain bond. Hence half of the elapsed time period can be attributed to respondent's uncertainties as to whether the reparation award would be paid and delay in advising the Department of its intentions. In addition, at no time did respondent press the Department for a quicker determination.

Even if the failure to exercise due diligence in setting a bond were a defense in a disciplinary action (which is not the case, since there is nothing in the Act to suggest that the employment restrictions can be ignored if the Secretary is dilatory in setting the amount of the bond), the record here shows no unreasonable delay that would constitute a good defense. (And even if it did, and even if a delay were a valid defense, the defense would not be applicable to the time period after September 24, 1982, when the bond amount was set.)

As to the amount of the bond, the ALJ correctly concluded that it "cannot be determined from the evidence in this proceeding whether the \$125,000.00 for the amount of the bond requested is arbitrary, capricious and unreasonable, agency action" (Initial Deci-

sion at 23). Although Arend Ferwerda seemed shocked at the estimated \$100,000 bond figure, he did not complain at any time to any Department official or to any court as to the final bond determination.

No opinion is expressed in this decision as to whether the Secretary's bond determination is judicially reviewable if the issue is raised before a violation occurs. The Act states that the bond shall be "in form and amount satisfactory to the Secretary" (7 U.S.C. §499h(b)). Assuming, without deciding, that arbitrary action could be set aside, the obvious remedy is to complain either to the administrative officials or to the appropriate court—not to ignore the statutory restrictions and continue to employ a restricted individual without obtaining a bond. There is nothing in the Act to support respondent's attorney's "afterthought" that respondent can violate the statutory restrictions and collaterally attack the bond determination by way of defense in a disciplinary proceeding.

Respondent also complains that the factors considered in setting the amount of the bond are not published in the Federal Register, but, here again, that issue is not a defense here. Even if that issue could appropriately be raised here, publication of the bond determination factors is not required. The factors considered in determining a bond are not "substantive rules of general applicability adopted as authorized by law," or "statements of general policy or interpretations of general applicability formulated by the agency" (5 U.S.C. § 552(a)(1)(D)), and, therefore, they are not required to be published in the Federal Register.

Even if the bond determination factors were required to be published, respondent received actual notice in the Department's letter of February 16, 1982, as to the significant factors that are considered in determining a bond, and respondent received actual notice of the Department's internal instructions relating to bond determinations at the hearing in this case (RX C and D). Respondent's actual notice of the factors would preclude reliance on any failure to comply with publication requirements. *Giles Lowery Stockyards, Inc. v. USDA*, 565 F.2d 321 (1977), cert. denied, 436 U.S. 957 (1978).

IV.

Respondent's conduct in continuing to "employ" Robert Ferwerda after notice completely thwarted the congressional purpose to provide assurance that respondent's business would be conducted in accordance with the Act and that respondent would pay all reparation awards, notwithstanding its potential contamination from Robert Ferwerda's affiliation with the firm.

Arend Ferwerda advised the Department orally and in writing that Robert Ferwerda's employment ended the week of March 25, 1982. If the Department had not heard rumors from the trade that Robert Ferwerda's employment continued during the restricted period, the Department would probably have not learned that the congressional purpose had been defeated. Hence advertently or inadvertently, Arend Ferwerda misled the Department as to an important matter.

Respondent's violation of the employment restrictions is a very serious violation of the Act that could have caused great damage to the industry irrespective of whether Arend Ferwerda knew that Robert Ferwerda's affiliation with respondent constituted "employment," within the meaning of the Act. Although the ALJ concluded that Arend Ferwerda did not intentionally violate the Act, he knew, or should have known, that he was operating dangerously close to the borderline of illegality. It would not be a mitigating circumstance even if Arend Ferwerda did not know that he had overstepped the borderline.

Arend Ferwerda had been a licensee under the Act for many years. It was his duty to know the statutory requirements. He was operating in an industry subject to pervasive federal regulation because of its great national importance. The definition of "employment" in the Act is very clear, even to a layman. If Arend Ferwerda did not want to bother to read the Act, he could easily have asked any PACA employee as to whether Robert Ferwerda's affiliation with respondent constituted "employment."¹⁹

If we were to reduce the sanction in this case on the ground that Arend Ferwerda did not actually know that he was violating the Act, it would place a premium on maintaining ignorance as to the statutory requirements. That policy would defeat the congressional purpose, and will not be followed here.

Since respondent committed a very serious violation of the Act continually during a period of approximately 2 years, respondent's license should be revoked to serve as an effective deterrent not only to respondent but to other potential violators (see § 11(C), *supra*).

Under the Administrative Procedure Act, a revocation or suspension order cannot be issued unless the violations were willful or a prior warning letter was sent. Specifically, the Act provides (5 U.S.C. § 658(c)):

¹⁹ It would have been better practice for the Department to have quoted the definition of employment in the letter of February 16, 1982. But it is respondent's duty to know the law, or, if not, to ask questions of the administrative officials.

Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given—

(1) notice by the agency in writing of the facts or conduct which may warrant the action; and

(2) opportunity to demonstrate or achieve compliance with all lawful requirements.

In the present case, respondent received a prior warning letter, with an opportunity to achieve compliance with all lawful requirements. Hence it is not necessary to show that the violations were willful.

But even if it were necessary to show that the violations were willful, respondent's violations were willful, within the meaning of that term in the Administrative Procedure Act. *In re Shatkin*, 34 Agric. Dec. 296, 297-314 (1975). "Under PACA, an action is willful if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements." *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (*per curiam*), *cert. denied*. 450 U.S. 997 (1981); accord *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 778 (1983).²⁰

It should be noted in passing that the ALJ's cease and desist order is unlawful in two respects. First, there is no statutory authority in the Perishable Agricultural Commodities Act for the issuance of a cease and desist order. Second, the statutory restriction as to the employment of a person against whom there is an unpaid reparation award is applicable only "within two years" after the issuance of the award (7 U.S.C. § 499h(b)(3)). Accordingly, the ALJ's order could not have been issued in this case, even if such a mild sanction were appropriate for the serious violations found here.

V.

Respondent seeks to reopen the hearing to take further evidence with respect to the meaning of "employment," and as to the determination of respondent's bond. The meaning of "employment" is a matter of statutory interpretation—not evidence—and, as set forth

²⁰ The definition of willful in *TWA v. Thurston*, 106 S. Ct. 613, 624-26 (1985), is based on the legislative history of the Age Discrimination Employment Act, which is quite different from the legislative history of the term willful under the Administrative Procedure Act. Accordingly, the Court's holding in *Thurston* as to the meaning of "willful" is not appropriate for use in our Department's disciplinary proceedings.

above, the bond issue is not an appropriate issue in this disciplinary proceeding. Hence the petition to reopen is denied.

For the foregoing reasons, the following order should be issued.

ORDER

Respondent's license is revoked.

The facts and circumstances as set forth herein shall be published.

This order shall take effect on the 30th day after service thereof on respondent.

APPENDIX

Excerpt from *In re Worsley*, 33 Agric. Dec. 1547, 1556-71 (1974).

U.S.D.A. Sanction Policy

[Excerpt omitted.—Ed.]

In re: TOP QUALITY FRUIT & PRODUCE DISTRIBUTORS, INC. PACA
Docket No. 2-6910. Decided January 27, 1986.

Failure to pay—Revocation of license.

The Judicial Officer affirmed Administrative Law Judge Weber's order revoking respondent's license for failure to pay for produce. Respondent's admitted failures to make payment constitute willful, flagrant and repeated violations of the Act.

Andrew Standa, for complainant.

Robert B. McLean, for respondent.

William J. Weber, Administrative Law Judge.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*),¹ in which Administrative Law Judge William J. Weber (ALJ) filed an initial Decision and Order on November 8, 1985, revoking respondent's license for failure to pay 20 sellers \$86,847.18 for 55 lots of produce purchased and accepted in interstate commerce from June 1984 through December 1984.

¹ See generally Campbell, "The Perishable Agricultural Commodities Act Regulatory Program," in I Davidson, *Agricultural Law*, ch. 4 (1981 and Aug. 1985 Supp.), and Becker and Whitten, "Perishable Agricultural Commodities Act," in 10 Harl. *Agricultural Law*, ch. 72 (1980).

On December 10, 1985, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.35).^{*} On December 31, 1985, the case was referred to the Judicial Officer for decision.

Oral argument before the Judicial Officer, which is discretionary (7 CFR § 1.145(d)), was requested by respondent, but is denied inasmuch as the issues are not novel or difficult, the case has been thoroughly briefed, and oral argument would seem to serve no useful purpose.

FINDINGS OF FACT

1. Respondent, Top Quality Fruit & Produce Distributors, Inc., is a Texas corporation whose address is P.O. Box 6208, McAllen, Texas.

2. Pursuant to the licensing provisions of the PACA, license number 831550 was issued to respondent on September 16, 1982. This license has been renewed annually and was subject to renewal on or before September 16, 1985. The Department has, to date, not received a renewal application from the respondent.

3. The Secretary has jurisdiction in this proceeding.

4. As more fully set forth in complainant's Motion for Decision on the Pleadings and Supporting Memorandum, during the period June 1984 through December 1984, respondent purchased from 20 sellers and accepted, in interstate and foreign commerce, 55 lots of perishable agricultural commodities, but failed to make any payment of the agreed purchase prices, which total \$86,847.18.

CONCLUSIONS

Respondent has admitted in its answer that it failed to make payment for the produce alleged in the complaint. Respondent's admitted failures to make payment constitute willful, flagrant and repeated violations of § 2(4) of the PACA (7 U.S.C. § 499b(4)). *In re B. G. Sales Co., Inc.*, 44 Agric. Dec. ____ (Oct. 9, 1985), a copy of which is attached as an appendix to this decision. Accordingly, the following order is issued.

^{*} The position of the Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), reprinted in 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

ORDER

Respondent's license is revoked.

Respondent has committed repeated and flagrant violations of § 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)).

The facts and circumstances set forth above should be published.

This order shall become effective on the 30th day after service on respondent.

APPENDIX

In re B. G. Sales Co., 44 Agric. Dec. ____ (Oct. 9, 1985).
[Excerpt omitted.—Ed.]

In re: EAST TENNESSEE PRODUCE, INC. PACA Docket No. 2-6966. Decided December 19, 1985.

Edward Silverstein, for complainant.
Respondent, pro se.

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on September 26, 1985, by the Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period June through December 1984, respondent purchased, received, and accepted, in interstate commerce, from 36 sellers, 160 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$283,497.91.

A copy of the complaint was served upon respondent which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 CFR 1.139).

FINDINGS OF FACT

1. Respondent, East Tennessee Produce, Inc., is a corporation, whose address is 2221 Forest Avenue, Knoxville, Tennessee 37916.

2. Pursuant to the licensing provisions of the Act, license number 921634 was issued to respondent on August 10, 1982. This license was renewed annually, but terminated on August 10, 1985, pursuant to Section 4(a) of the Act (7 U.S.C. 499d(a)) when respondent failed to pay the required annual license fee.

3. As more fully set forth in paragraph 5 of the complaint, during the period June through December 1984, respondent purchased, received, and accepted in interstate commerce, from 86 sellers, 160 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$283,497.91.

CONCLUSIONS

Respondent's failure to make full payment promptly with respect to the 160 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. 499b), for which the Order below is issued.

ORDER

A finding is made that respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. 499b), and the facts and circumstances set forth above, shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 CFR 1.139 and 1.145).

Copies hereof shall be served upon parties.

[The Decision and Order became final on January 31, 1986.—Ed.]

In re: FONSECA FOODS DISTRIBUTORS, INC. PACA Docket No. 2-6826.
Decided December 17, 1985.

Eric Paul, for complainant.
Alan Ross, for respondent.

Decision by Edward H. McGrail, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a combined show cause and disciplinary proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), hereinafter the "PACA", the regulations promulgated pursuant to the PACA (7 CFR 46.1 through 46.45), and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary (7 CFR 1.130 through 1.151), hereinafter the "Rules of Practice". The proceeding was instituted by a Notice to Show Cause and a complaint filed on May 15, 1985, by the Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the Notice to Show Cause and complaint that Fonseca Foods Distributors, Inc., hereinafter "respondent", violated Section 2(d) of the PACA (7 U.S.C. 499b(4)) during the period July 1984 through November 1984, by failing to make full payment promptly of the agreed purchase price of 120 lots of perishable agricultural commodities which it purchased and received in interstate and foreign commerce from five sellers of perishable agricultural commodities, in the total amount of \$229,661.80. It was further alleged that respondent's license terminated on January 31, 1985, pursuant to Section 4(a) of the PACA (7 U.S.C. 499d(a)), when respondent failed to pay the required annual license fee; and that respondent should be denied a license sought pursuant to an application received April 15, 1985, because it has engaged in practices of the character prohibited by the PACA. Complainant duly withheld the issuance of this license pursuant to Section 4(d) of the PACA, which requires that respondent be given an opportunity for hearing within sixty days of the date of the application.

An oral hearing was set for June 4, 1985. Respondent filed an answer on May 30, 1985, in which it admitted the jurisdictional allegations of the complaint and the filing of a voluntary petition on November 8, 1984, pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. 1101 *et seq.*); denied that its license had terminated on January 31, 1985; and denied, in part, the failure to make full payment promptly allegation. Respondent affirmatively asserted that

actions did not constitute wilful, flagrant and/or repeated violations of section 2(4) of the PACA, and that it was acting in conformity with various provisions of the Bankruptcy Code with the agreement of the perishable agricultural produce sellers named in the complaint. Respondent requested that the oral hearing set for June 4, 1985, be continued to July 3, 1985.

A rescheduled oral hearing was held on July 2, 1985, before the undersigned in Los Angeles, California. Complainant was represented by Eric Paul, Esq., Office of the General Counsel, United States Department of Agriculture, Washington, D.C. 20250-1400. Respondent was represented by Alan Ross, Esq., Los Angeles, California 90012. Complainant presented two witnesses and nine exhibits which were received into evidence. Respondent cross-examined complainant's witnesses but presented no testimony or exhibits. The parties were provided opportunity to submit simultaneous briefs by August 23, 1985, however, only complainant took advantage of submitting such brief. Reference to complainant's exhibits and to specific pages in the transcript will hereafter be by the prefix "Ex." and the prefix "Tr.", respectively.

DISCUSSION AND CONCLUSIONS

The evidence adduced at hearing showed that respondent failed to pay five produce firms \$229,661.80 owed with respect to 120 lots of tropical fruits purchased in interstate or foreign commerce. It does not appear that the financial condition of respondent, as set forth in its bankruptcy filings, is such as will permit the full payment for these purchases at any time in the future and operations are now being conducted without a PACA license in effect, although an application for a PACA license has been filed. It is the position of complainant that this case presents nothing more than a normal disciplinary proceeding brought against a produce debtor that has failed to pay for produce purchased and received in interstate or foreign commerce and a normal show cause proceeding with respect to an applicant that is unfit to be licensed by virtue of having engaged in conduct of a character that is prohibited by the PACA. The commencement of a Chapter 11 proceeding in bankruptcy does not excuse such flagrant and repeated violations of the PACA as have been established, and the appropriate sanction, in accordance with sections 4 and 8 of the PACA (7 U.S.C. §§ 499d, 499h) and the sanction policy of this Department, is the issuance and publication of findings that respondent has engaged in flagrant and repeated violations and is unfit to be licensed under the PACA.

Respondent has totally failed to pay for perishable agricultural commodities worth \$229,661.80. Failure to pay for produce is a very

serious violation of the PACA which requires revocation of the license of the offender, whenever a valid license is in effect. See *In re Bananas, Inc.*, 42 Agric. Dec. 588, 590 (1983). In the present case no license remains in effect to be revoked since the respondent's former license terminated on January 31, 1985.

No attempt had been made by respondent to renew this license. Rather, an inadequate fee was tendered in connection with the submission of an application for the issuance of an entirely new license on November 29, 1984. Even assuming that this submission could have been handled as a payment of an annual license renewal fee, it would not have effected a renewal since section 4(n) of the PACA (7 U.S.C. § 499 d(a)) and section 46.6 of the regulations (7 CFR § 46.6) require payment of the prescribed fee and set the amount of such fee at \$180.00, respectively. The correct amount was not submitted until March 21, 1985, a date well beyond the thirty day statutory limit set for a late filing of the prescribed annual license fee (7 U.S.C. 499d(a)).

Complainant, therefore, has sought publication of a finding that respondent has engaged in repeated and flagrant violations of the Act. Such a finding has the same effect on respondent and on those responsibly connected with respondent as revocation of a license under the PACA. *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 748-49 (1982); *In re Pappas Produce, Inc.*, 36 Agric. Dec. 684, 695 (1977). Respondent's failures to make full payment promptly with respect to the 120 designated transactions clearly constitute repeated and flagrant violations of section 2 of the PACA (7 U.S.C. § 499b). The large number of transactions alone establishes that the violations were repeated. *Reese Sales Co. v. Hardin*, 458 F.2d 183, 187 (9th Cir. 1972); *Zwisch v. Freeman*, 373 F.2d 110, 115 (2d Cir.), *cert denied*, 389 U.S. 836 (1967); *In re Bananas, Inc.*, 42 Agric. Dec. 588, 593 (1983). Respondent's violations were also flagrant. In the *Bananas* case, which involved 26 sellers and \$54,045.43, the Department's Judicial Officer concluded that the number of transactions and the large amount involved made the violations flagrant. They were also found to be flagrant because, just as in the present case, the respondent continued to make new purchases over a period of several months, without being able to make payment for produce purchased earlier. *Id.* Also see *Wayne Cusimano, Inc. v. Block*, 692 F.2d 1025, 1029 (5th Cir. 1982); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir. 1973) *cert denied*, 419 U.S. 830 (1974). The 120 transactions in the present case called for full payments to be made on numerous dates falling within a four month period, July 8, 1984 through November 6, 1984, as scheduled in paragraph 6 of the complaint (Ex. 9; Tr. 31). Each of these transactions required

payment prior to respondent's filing for relief under Chapter 11 of the Bankruptcy Code on November 8, 1984.

Accordingly, respondent's plead defense that the five sellers named in paragraph 6 of the complaint had received substantial payments since July 1984, and had consented to the payment of current purchases first in accord with required Chapter 11 procedure would not have been relevant, even had respondent submitted supporting evidence. Moreover, even if payments had not been due prior to the filing of the Chapter 11 petition, the violations would not have been either excused or mitigated. All excuses, including bankruptcy, are routinely rejected in disciplinary proceedings involving payment violations since "the Act calls for payments not excuses." *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2428, 1442-44 (1982) affirmed *Melvin Beene Produce Company v. Agricultural Marketing Service*, 728 F.2d 347 (6th Cir. 1984).

It was alleged and denied that these violations were wilful. A violation of the PACA is wilful if, irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by the statute or a person carelessly disregards the requirements of the statute. *Finer Foods Sales Co., Inc. v. Block* (708 F.2d 774, 778 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert denied*, 450 U.S. 997 (1981); *In re Henry S. Shatkin*, 34 Agric. Dec. 296 (1975); *In re G. Steinberg & Sons, Inc.*, 32 Agric. Dec. 236, 263-269 (1973) *aff'd sub nom., George Steinberg and Sons, Inc. v. Butz*, 491 F.2d 988 (2d Cir.); *cert denied*, 419 U.S. 830 (1974). Respondent's violations were clearly wilful. However, no finding to this effect need be made since there is no license to be revoked. See *Fava & Company, Inc.*, 43 Agric. Dec. ____ (PACA Docket No. 2-6547, December 4, 1984) (Ruling on Certified Question); *In re Bananas, Inc.*, 42 Agric. Dec. 588, 594 (1983).

A finding that respondent is unfit to be licensed under the PACA in that it has engaged in practices of a character prohibited by the PACA is required. Section 4(d) of the PACA (7 U.S.C. § 499d(d)) provides, *inter alia*, that the Secretary may refuse to issue a license when, after hearing, the Secretary finds that the applicant "prior to the date of the filing of the application engaged in any practice of the character prohibited by this Act" The repeated and flagrant failures of respondent to make full payment promptly constitute a practice expressly prohibited by section 2(4) of the PACA (7 U.S.C. § 499b(4)). *In re Pappas Produce*, 36 Agric. Dec. 684, 691 (1977); *In re Ludwig Casca*, 34 Agric. Dec. 1917 (1975). As a direct consequence of respondent's engaging in this prohibited practice

produce purchases in the total amount of \$229,661.80 remain unpaid as of the date of hearing.

It has been recognized by respondent that its status as a debtor in possession under Chapter 11 of the Bankruptcy Code does not affect the jurisdiction of the Secretary to enter the requested finding and deny issuance of a new license (Respondent's Answer, paragraph 9; 11 U.S.C. § 525). Moreover, as Mr. James R. Frazier, head of the trade practice section of the PACA branch, Agricultural Marketing Service, explained in connection with the presentation of sanction testimony supporting the entry of finding of repeated and flagrant violations and denial of a license:

It would make no difference to us whether the firm was in bankruptcy or not in bankruptcy. As a matter of fact for us not to take an action against a firm first because they filed bankruptcy, would be to discriminate against firms which don't file bankruptcy . . . (Tr. 20-21)

The Department has consistently enforced the PACA in an even-handed manner to insure that only financially responsible persons should be engaged in businesses subject to the Act even when, as herein, the respondent is a debtor seeking to reorganize in bankruptcy. *In re Veg-Mix, Inc.*, PACA Docket No. 2-6612, 44 Agric. Dec. ____ (August 21, 1986). *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2433-40 (1982); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1176-82 (1982) *aff'd*, 708 F.2d 774, 782 (D.C. Cir. 1983); *Zwick v. Freeman*, 873 F.2d 110, 117 (2d Cir.), *cert. denied*, 389 U.S. 835.

A finding should be published as to the respondent's violations as authorized by section 8a of the PACA (7 U.S.C. § 499b(a)) in order to serve as an effective deterrent to future similar violations by respondent or other potential violators. *In re Pappas Produce, Inc.*, 36 Agric. Dec. 684, 695 (1977).

FINDINGS OF FACT

1. Respondent is a California corporation whose sole officers, directors and shareholders are Jose Fonseca, Carmen Fonseca and Javier Fonseca.

2. Respondent's mailing address is 1308 East 7th Street, Los Angeles, California 90021 (Respondent's Answer, paragraph 1).

3. Pursuant to the licensing provision of the PACA, license number 840644 was issued to respondent on January 31, 1984. This license terminated on January 31, 1985, pursuant to Section 4(a) of the PACA (7 U.S.C. 499d(a)), when respondent failed to pay the required annual license fee (Ex. 1, 5; Tr. 10-13).

4. On November 8, 1984, respondent filed a petition seeking relief pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. § 1101 et seq.), in the United States Bankruptcy Court for the Central District of California, Case No. LA 84 422325 (Respondent's Answer, paragraph 1, Ex. 8).

5. On November 29, 1984, respondent applied for the issuance of a new license and enclosed a check in the amount of \$108.00 (Ex. 3; Tr. 10).

6. This application was returned on March 4, 1985, after efforts made by telephone to obtain the proper license fee, \$180.00, had proved fruitless. Respondent was advised that the incorrect fee submitted was being refunded and that it could reapply for a license (Ex. 4; Tr. 11-12).

7. On March 15, 1985, a notice was served on respondent that its license under the PACA had terminated on January 31, 1985 (Ex. 5; Tr. 12).

8. On March 21, 1985, a license application accompanied by the proper fee was received (Ex. 6; Tr. 13).

9. On April 1, 1985, this application was returned for additional information relevant to the determination of the amount of surety bond that was posted because of the bankruptcy and for a completion of the application form with respect to the bankruptcy (Ex. 7; Tr. 13-14).

10. A resubmitted application to which a copy of the Chapter 11 petition was attached was received on April 15, 1985 (Ex. 8; Tr. 14).

11. The Notice to Show Cause why this April 15, 1985, license application should not be denied was filed with the Hearing Clerk on May 15, 1985, within the thirty day period required by section 4(d) of the PACA (7 U.S.C. § 499d).

12. An oral hearing set for June 4, 1985, within the sixty days required by section 4(d) of the PACA (7 U.S.C. § 499d) was continued to July 2, 1985, after respondent had waived its right to early hearing by motion filed May 30, 1985.

13. An investigation was ordered performed to determine whether the respondent was in violation of section 2 of the PACA (7 U.S.C. § 499b) by reason of failures to make full payment promptly with respect to purchases of perishable agricultural commodities after it had been determined that the respondent's bankruptcy schedules listed debts in excess of \$400,000.00 owed to creditors that were known to be produce companies (Ex. 8; Tr. 16-19).

14. Mr. Barry Flick, a marketing specialist employed by the complainant examined respondent's unpaid invoices on May 2, 1985 (Tr. 27-28).

15. Respondent's Vice-President, Carmen Fonseca, provided Mr. Flick with five folders containing unpaid invoices received from the five produce sellers named in paragraph 6 of complaint (Tr. 28-29).

16. Mr. Flick excluded all unpaid invoices that pertained to perishable agricultural commodities that could have been intrastate in origin, leaving invoices covering 120 lots of bananas, mangoes and pineapples—fruits subject to the PACA that are not grown commercially in California and, therefore, were of foreign origin (Tr. 29-31).

17. The 120 lots of perishable agricultural commodities scheduled in paragraph 6 of the complaint were received with invoices that appear in complainant's Exhibit 9, marked as to lot, Transaction 1-Transaction 120A. Although payments totalling \$229,661.80 were due on these purchases prior to respondent's filing of its Chapter 11 petition on November 8, 1984, they remained unpaid as of the date of the investigation, May 2, 1985 (Tr. 31-32).

ORDER

1. Respondent, Fonseca Foods Distributors, Inc., has committed flagrant and repeated violations of section 2 (4) of the PACA (7 U.S.C. § 499b(4)).

2. Respondent is unfit to be licensed under the PACA in that it has engaged in practices of the character prohibited by the PACA.

3. Respondent's application for a license is denied.

4. The facts and circumstances of such violations shall be published.

This Order shall take effect on the 11th day after the Decision becomes final.

Pursuant to the Rules of Practice, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in section 1.145 of the Rules of Practice (7 CFR § 1.145).

Copies hereof shall be served upon the parties.

[The Decision and Order became final on January 31, 1986.—Ed.]

In re: MAX KAUFMAN, INC. PACA Docket No. 2-6929. Decided November 29, 1985.

By: Stephen Laporello, for complainant.
Respondent, pro se.

Decision by Victor W. Palmer, *Administrative Law Judge.*

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the Act, instituted by a complaint filed on August 12, 1985, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period February, 1984, through August, 1984, respondent purchased and accepted, in interstate and foreign commerce, from 13 sellers, 66 lots of fruit and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$403,790.52.

A copy of the complaint was served upon respondent on August 24, 1985, which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a default order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. Respondent, Max Kaufman, Inc., is a corporation whose address is 750 South Central Avenue, Los Angeles, California.

2. Pursuant to the licensing provisions of the Act, license number 681818 was issued to respondent on April 19, 1968. This license was renewed annually, but terminated April 19, 1985, when respondent failed to renew it.

3. As more fully set forth in paragraph 5 of the complaint, during the period February, 1984, through August, 1984, respondent purchased and accepted in interstate and foreign commerce from 13 sellers, 66 lots of fruit and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$403,790.52.

CONCLUSIONS

Respondent's failure to make full payment promptly with respect to the 66 transactions set forth in Finding of Fact No. 3 above, con-

stitutes wilful, repeated and flagrant violations of section 2 of the Act (7 U.S.C. § 499b), for which the Order below is issued.

ORDER

A finding is made that respondent has committed wilful, flagrant and repeated violations of section 2 of the Act (7 U.S.C. § 499b), and the facts and circumstances set forth above, shall be published.

This order shall take effect on the 11th day after this decision becomes final.

Pursuant to the Rules of Practice governing proceedings under the Act, this decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 CFR §§ 1.139, 1.145).

Copies hereof shall be served upon parties.

[The Decision and Order became final on February 4, 1986.—Ed.]

In re: PERFECT POTATO PACKERS, INC. PACA Docket No. 2-6553. Decided February 14, 1986.

Revocation of license—False and misleading application for license.

The Judicial Officer affirmed Administrative Law Judge Weber's decision revoking respondent's license because the application for the license was false and misleading. Complainant need only prevail by a preponderance of the evidence. The ALJ, who saw and heard the witnesses testify, was in the best position to resolve conflicts in testimony. The Judicial Officer may, when necessary, take official notice of a license on file in the Department. The corporate veil may be pierced when one person is the beneficial owner of 100% of the stock of the corporation. A license which has been allowed to expire can, nonetheless, be revoked or suspended.

Edward Silverstein, for complainant.

Stephen P. McCarron, for respondent.

William J. Weber, Administrative Law Judge.

Decisions by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a et seq.).*

* See generally Campbell, "The Perishable Agricultural Commodities Act Regulatory Program," in 1 Davidson, *Agricultural Law*, ch. 4 (1981 and Aug. 1985 Supp.), and Becker and Whitten, "Perishable Agricultural Commodities Act," in 10 Harl, *Agricultural Law*, ch. 72 (1980).

which Administrative Law Judge William J. Weber (ALJ) filed his initial Decision and Order on Reconsideration on October 17, 1985, revoking respondent's license because the application for the case was false and misleading.

On November 20, 1985, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (CFR § 2.35).^{**} On December 16, 1985, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the entire record, the initial Decision and Order on Reconsideration is adopted as the final decision and Order in this case (with a few trivial changes), except that the effective date of the order is changed in view of the appeal. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION DECISION AND ORDER ON RECONSIDERATION^{*}

Philip R. Weller ("Weller") operated a number of business entities,¹ some in Canada. He held a Perishable Agricultural Commodities Act handler's license for a number of years and was one of the larger dealers in potatoes.

In January 1984, Weller allowed his Perishable Agricultural Commodities Act license to expire by his failure to renew it.

Weller agreed to entry of an administrative disciplinary decision in August 1984, finding that between October 1981 and August 1983, Weller had "failed to make full payment promptly (for pota-

^{**} The position of Judicial Officer was established pursuant to the Act of April 4, 1946 (7 U.S.C. §§ 405e-405g), and Reorganization Plan No. 2 of 1961, 18 Fed. Reg. 3218 (1953), reprinted in 5 U.S.C. app. at 1008 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

^{*} Respondent filed a motion to reconsider the decision and order. It mainly focuses on two points: first, what respondent characterizes as "the basis of the decision"—finding of fact #35, page 15—and secondly, a partially exculpatory comment on the lack of criminal intent to cheat and defraud those whom Weller owed money (decision and order, page 26).

Respondent isolates these two points from the clear context in which they are imbedded, and misconstrues them.

The basic decision remains the same except for supplemental material added in footnotes^a (page 1),²⁰ (page 15), and^b (page 26).

^a These included trucking, potato dealing, sales "research" and heating.

toes he purchased) . . . in the total amount of \$823,611.38 * * * [in] repeated and flagrant [violation] . . . of the Perishable Agricultural Commodities Act." Complainant's Exhibit 19, pages 2 and 3.

Weller's businesses and financial status faced serious cash flow problems and threats of litigation by May 1983. Three reparation complaints were pending against him under the Perishable Agricultural Commodities reparation procedures for failure to promptly pay.

Weller, in May 1983, seized upon the idea of forming a new corporation—Perfect Potato Packers, Inc.—using some of his loyal and dedicated employees as the incorporators, directors, officers and stockholders through which he could continue potato operations and insulate some funds from growing financial delinquencies.

An application for a Perishable Agricultural Commodities license was filed by Perfect Potato Packers, Inc., in May 1983, listing employees of various Weller controlled entities as the directors, officers and stockholders of Perfect Potato Packers, Inc. ("PPP") No mention was made of Weller in any capacity with the corporation. Nothing indicated Weller's relationship to the applicant corporation, its reported directors, officers or shareholders.

That application of PPP, on its face, appeared to be proper. There was no apparent reason to raise suspicions or doubts. It was approved and a license was issued.

Complainant now seeks to revoke that license on the grounds that it was fraudulently obtained through false and misleading statements in willful violation of sections 3 and 8(c) of the PACA (7 USC §§ 499c and 499h(c)) and section 46.4 of the Regulations (7 CFR § 46.4).

Respondent denied any violation of the Act or Regulations.

Trial of the issues took place November 14, 15, 1984 in Hartford, Connecticut. The last brief was filed April 5 1985. Much of this decision is taken from complainant's detailed, annotated record-supported brief. Generally, the testimony of witnesses Myrna Sterin, Philip Tutoian, Marc Benoit, and Salvatore Julian was persuasive, sincere and worthy of controlling probative value concerning disputed operative facts here.

Complainant clearly has presented reliable, probative, persuasive, credible evidence in support of the Complaint allegations.

While only a preponderance of the evidence is necessary to support the Complaint allegations, in many instances here, the evidence is clear and convincing that the operations of the central figure here, Phillip R. Weller ("Weller"), were dominated by him with little regard for legal distinctions between his various enter-

prises and activities. Many of his businesses were administratively supported by a central corps of clerical personnel who were a semi-al pool to be utilized for the various businesses as needed. This basic concept is key to evaluating the evidence here.

Respondent also argues, *inter alia*, that Complainant never established that respondent PPP held a PACA license. The evidence here establishes a *prima facie* case that respondent PPP did hold a PACA license at all material times here. Respondent, in fact, does not actually deny it was licensed, as alleged in the Complaint (it either admits nor denies that allegation based on its claimed lack of knowledge).

Several witnesses testified concerning the license and much of their testimony was premised on the existence of a license. If respondent had not been licensed at the time of the incidents described in the testimony, then much of the evidence from both complainant and respondent would be utterly without basis or foundation. All of respondent's behavior, statements and position during the investigation is premised on the respondent holding a current, active PACA license.

There can be no question whatsoever on this record that respondent corporation held the PACA license that it applied for during the events covered by this record.

* * * * *

1. Respondent is a Connecticut corporation whose mailing address is P. O. Box 408, East Windsor, Connecticut 06088, and whose business address is North Road, East Windsor, Connecticut 06088.¹

2. On May 19 1988, respondent submitted a completed application for license under the PACA in which Marc G. Benoit (hereinafter "Benoit") was reported as its president, director and 100% stockholder. The application also listed Francis Sedar (hereinafter Sedar") as the respondent's vice president and secretary, and Charles Frascaona (hereinafter "Frascona") as its treasurer. This application was signed by Benoit, Sedar, and Frascaona, each of whom certified that the information contained therein was true.²

3. Based on the information provided in respondent's application for license under the PACA and pursuant to the licensing provisions of the PACA, license no. 831032 was routinely issued to re-

¹ Complaint ¶¶ 1 and 2; Answer ¶ 2.

² Complaint ¶ 3; Answer ¶ 3; Hearing Transcript pages 11-12; Complainant's Exhibit No. 1.

spondent on May 26 1983 and was next subject to renewal on or before May 26 1984.³

4. Although respondent's PACA license application reflected that Benoit was its president and a director, that Sedar was its vice president and secretary, and that Frascona was its treasurer, no organizational meetings were ever held, and no directors or officers were ever elected.⁴

5. From at least January 29 1978 through January 29 1984, one Phillip R. Weller, who sometimes traded as Richard Weller, was a potato dealer licensed under the PACA. During May 1983, Weller told Benoit, who was one of his employees, that he wished to start a new company because of problems which his (Weller's) then existing business entities were having. This new entity, first called "Windsor Potato Company, Inc.," eventually became the respondent corporation, Perfect Potato Packers, Inc.⁵

6. The paperwork creating the respondent corporation was prepared by Philip E. Tatoian, Jr., Esq., an attorney who, at least during the period January 1 1983 through December 31 1983, represented Weller. Mr. Tatoian performed the legal services at Weller's request. As noted above, Weller was in the business of buying and selling potatoes. During 1982 and 1983, Weller found himself suffering from a cash shortage, and was being pressed by his creditors for payment. In order to prevent his creditors' actions from impeding his business operations, Weller formed respondent, and caused respondent to secure a PACA license, to allow him to continue to conduct his potato business. Respondent merely was an extension of Weller's previous business activities, and he was in sole control of its operations. Neither Benoit nor Sedar gave Mr. Tatoian directions with regard to forming the new corporation, and had no say in its formation.⁶

7. Benoit was never asked by Weller or anyone else to have a financial interest in the new company, and never contributed capital towards it. Moreover, although respondent's license application reflected that Benoit owned 100% of the corporation's stock, no stock was ever issued to him, nor to anyone else. However, Weller owned

³ Complaint ¶ 4; Hearing Transcript pages 9-18, 21-22, 332-55; Complainant's Exhibits Nos. 1 and 2.

⁴ Complaint ¶¶ 3, 4, and 10; Hearing Transcript pages 11-12, 117-120. Complainant's Exhibit No. 1.

⁵ Hearing Transcript pages 27, 40-41, 51-52, 187-188, 140; Complainant's Exhibits Nos. 1, 4, 13, and 19.

⁶ Complaint ¶ 8; Hearing Transcript pages 12-13, 27, 40-41, 51-52, and 110-117, 213, 218, and 336-339; Complainant's Exhibits Nos. 2, 4, 8, 13, 16 and 17.

a beneficial interest in 100% of the corporate stock, and at all times controlled the entities' business affairs.⁷

8. During at least the period January 1971 through August 1983, Benoit was employed by Weller directly or indirectly through a company owned by Weller. He was employed as a truckdriver, a potato salesman, and also helped operate Weller's trucking business.⁸

9. Benoit was chosen to be "president" of respondent by Weller and Frasca.⁹

10. During the period 1979 to the date of the hearing, Frasca was continually employed by Weller, or by a company which Weller controlled. Frasca also assisted Weller in operating companies in which he (Frasca) was not employed. In all instances he served Weller's interests.¹⁰

11. Although Frasca was its treasurer, he received no remuneration, in any form, from Perfect Potato Packers. During the time he worked on matters on behalf of PPP, he was on Weller's payroll.¹¹

12. Frasca owned no stock in Perfect Potato Packers.¹²

13. Frasca invested no capital into Perfect Potato Packers.¹³

14. During the period 1964 through the present, Sedar was employed by one of the Weller companies. At various times he worked for Dick Weller, Inc., Nurserymen's and Farmer's Shipping Association, and/or Action Brokerage.¹⁴

15. Although he was listed on the application for its PACA license as the vice president and secretary of Perfect Potato Packers, Sedar was not aware that he held such offices; he was never paid by or performed any significant services for PPP.¹⁵

16. Perfect Potato Packers used space in a building owned by Weller as its place of business. No lease agreement was ever signed, nor was any payment ever made for this use.¹⁶

⁷ Complaint ¶ 9; Answer ¶ 9; Hearing Transcript pages 9-18, 27, 40-41, 51-52, and 113-120, 130, 133-140 and 337-339; Complainant's Exhibits Nos. 1, 2, 4, 13 and 17.

⁸ Hearing Transcript page 134-135, 150-152; Complainant's Exhibits Nos. 2 and 4.

⁹ Hearing Transcript pages 27, 40-41, 51-52, and 149-150; Complainant's Exhibits Nos. 4 and 13.

¹⁰ Hearing Transcript pages 184-185, 205-207.

¹¹ Hearing Transcript pages 196, and 204-207; Complainant's Exhibit No. 1.

¹² Hearing Transcript page 195.

¹³ Hearing Transcript page 195.

¹⁴ Hearing Transcript pages 328-331. For a partial listing of the entities through which Weller operated see Finding of Fact No. 26, below.

¹⁵ Hearing Transcript pages 11-12, and 332; Complainant's Exhibit No. 1.

¹⁶ Hearing Transcript pages 146, 193.

17. In order to repack potatoes, Perfect Potato Packers used equipment owned by Weller, but no lease agreement was signed nor was any payment made to Weller for the use of this equipment. Moreover, the persons who operated the machinery were Weller employees.¹⁷

18. Perfect Potato Packers had no telephone of its own, but used Weller's telephones. No payment was made for this use.¹⁸

19. Weller's office was located in the same room as respondent's in Weller's building.¹⁹

20. Weller maintained one clerical staff, operating under the name Nurserymen's and Farmer's Shipping Association, in order to provide the clerical requirements for his various entities (including Perfect Potato Packers) through which he operated, such as payroll, insurance, etc. Thus, respondent's "employees" were paid for their work by Nurserymen's and Farmer's Shipping Association.²⁰

21. Perfect Potato Packers did not have its own payroll.²¹

22. At Weller's direction, Perfect Potato Packers paid Weller for the potatoes by bank cashier's check payable to Weller.²²

23. Payment by cashier's check was done to allow Weller to "selectively" pay obligations and favor his solar heating businesses.²³

24. Weller had opened two solar heating companies; Northeast Solar Resources (also operated out of Weller's office facilities on Shoham Road, East Windsor, Connecticut) and New York Solar Resources.²⁴

25. Creditors of Weller were sometimes paid directly by Perfect Potato Packers through the use of its corporate checks.²⁵

26. The Weller potato operation included at least the following companies in addition to Perfect Potato Packers: Weller International (sole stockholder was Weller's wife, Patricia); Weller Potatoes, 1982, Inc. (stockholders were Benoit and Sedar); Nurserymen's and Farmer's Shipping Association (a nonstock corporation whose directors were Weller, R. S. Vanderbourn, and Russell Kollum); Weller Farms, Inc. (Weller is sole stockholder); Dick Weller, Inc.

¹⁷ Hearing Transcript pages 146, 166-166, 190-191, 194-195, and 298-299.

¹⁸ Hearing Transcript pages 146-147, 221-222, and 299.

¹⁹ Hearing Transcript pages 148-149.

²⁰ Hearing Transcript pages 187-189, 197, 203-204, 222-223, and 295-296. Also see Finding of Fact No. 26, below.

²¹ Hearing Transcript page 189.

²² Hearing Transcript pages 36-51, 207-210; Complainant's Exhibits Nos. 7, 10, 11 and 12.

²³ Hearing Transcript pages 269-270.

²⁴ Hearing Transcript pages 272-274, 295 and 337-339; Complainant's Exhibit No. 17.

²⁵ Hearing Transcript pages 264-272, 299-300, and 311.

Weller is sole stockholder); Brokerage Services, Inc. (Weller is sole stockholder); Weller Potatoes (Canada) Ltd. (Weller is sole stockholder); Idaho Company (Weller is sole stockholder); Weller Import-Export Ltd. (stockholders are Thomas Hand and Francis DiPietro); Lick Weller (Ontario) Ltd. (David Black is sole stockholder).²⁶

27. All but the Canadian companies were physically located in the facility owned by Weller at Shoham Road in East Windsor, Connecticut.²⁷

28. As cash flow or other circumstances required, money was huffed back and forth among the several businesses, credits to one company assigned to another, or debts of one company directly paid by another.²⁸

29. Perfect Potato Packers paid Weller for the potatoes it purchased from him.²⁹

30. Weller gave a creditor of Perfect Potato Packers (Jerome Distributors) a personal note to cover the corporation's indebtedness of \$6,347.75.³⁰

31. Northeast Solar Resources paid a debt on behalf of Perfect Potato Packers in the amount of \$5,300.00. When the amount was repaid to Northeast Solar Resources, it was repaid in the amount of \$10,000.00. Respondent's books reflect that \$5,300.00 was credited to the debt owed Northeast Solar Resources, and \$4,700.00 was credited to its Weller account.³¹

32. Weller was issued a PACA license on January 29 1973. This license terminated on January 29 1984, when Weller failed to renew it in accordance with the requirements of section 4(a) of the PACA (7 USC 499d(a)). By a Consent Decision filed August 28 1984, *In re Phillip R. Weller d/b/a Richard Weller*, PACA #2-6604) a finding was made that Weller committed willful, flagrant and repeated violations of the PACA by failing, during the period October 1981 through August 1983, to make full payment promptly to 15 sellers of the agreed purchase prices, or balances thereof, in the total amount of \$823,611.38 for 387 lots of potatoes purchased, received, and accepted in interstate and foreign commerce.³²

33. On May 19 1983, three reparation complaints under the PACA, including one for \$275,000, were pending against Weller.³³

²⁶ Hearing Transcript pages 185, 196-203, 203-205, and 323-329.

²⁷ Hearing Transcript pages 296-297.

²⁸ Hearing Transcript pages 330, 315-319.

²⁹ Hearing Transcript pages 322 and 327-329; Complainant's Exhibit No. 17.

³⁰ Hearing Transcript pages 312-318.

³¹ Hearing Transcript pages 314-317.

³² Hearing Transcript pages 353-354; Complainant's Exhibit No. 19.

³³ Complaint ¶ 11; Hearing Transcript pages 351-352; Complainant's Exhibit No.

34. Respondent corporation's PACA license would not have been issued had complainant known or suspected Weller's control of respondent's business affairs, funds and personnel.³⁴

35. The statements by Benoit, Sedar, and Frasca on respondent's PACA license application concerning their ownership and control of respondent corporation were false and misleading in the sense that they concealed Weller's dominating control of all aspects of the various businesses, including PPP, Inc.³⁵

36. The acts of Benoit, Sedar, and Frasca in making false and misleading statements on respondent's application for a PACA license, and Weller's act of soliciting such false and misleading statements, are willful violations of sections 3 and 8(c) of the PACA (7 USC §§ 499c and 499h(c)) and section 46.4 of the Regulations (7 CFR § 46.4)

* * * * *

³⁴ Complaint ¶ 12; Hearing Transcript pages 352-356; Complainant's Exhibit No. 19.

³⁵ Complaint ¶ 13; Hearing Transcript pages 9-18, 27, 40-41, 51-52, 133-150, 165-169, and 176-177; Complainant's Exhibits Nos. 2, 4, 8, 13, 16, and 17.

Respondent, in its motion for reconsideration, inaccurately characterizes this comment as the "basis for the decision against respondent . . ." Page 1, respondent's motion for reconsideration [of the decision and order] filed September 16 1995.

The record establishes that the individuals were all aware of the serious financial problems besetting Weller and his various businesses. These financial difficulties gravely threatened Weller's license as a Perishable Agricultural Commodity handler so Weller allowed his license to lapse, and agreed to entry of a consent decision concerning failure to promptly pay over \$80,000 for potatoes he purchased.

Respondent corporation was formed for the precise, clear and primary purpose as a "front" to hold a PACA license and continue Weller's extensive potato business.

This conspiracy-like arrangement to conceal Weller's control and participation is clearly in violation of the spirit of the law and regulations.

In essence, respondent corporation was formed for the purpose of evading federal regulatory control over licensees and those "responsibly connected" with licensees.

The creation of a new business entity with a different legal form or structure, while the people play musical chairs, is prohibited. *Diane Mattes d/b/a Diane Mattes Livestock, et al. v. USDA*, 721 F.2d 1125, 1131 (CA 7 1983). See also § 3.28 in 1 Davidson, *Agricultural Law*, Ch. 3 (1981 and August 1984 Supp.) *In re George Townsend, et al.* 25 Agric. Dec. 1604, 1605, 1607, 1609, 1610-1615, 1617 (1976).

Here, respondent corporation Perfect Potato Packers was formed by Weller from bits and pieces of his other business operations to enable him to continue dealing in potatoes even though his PACA license had expired and several reparations proceedings pending against him could remain unsatisfied. (Unsatisfied final reparations decisions automatically suspend a PACA license.) Weller attempted to avoid these problems by forming the respondent corporation.

This action, brought pursuant to section 8(c) of the PACA (7 USC 499h(c)), seeks revocation of respondent's PACA license because the license was obtained through the use of false and misleading statements in its application. The PACA was enacted to regulate and control the handling of fresh fruits and vegetables. 71 Cong. Rec. S-2163 (May 29 1929). Its passage was occasioned by the severe losses that shippers and growers were suffering due to unfair practices on the part of commission merchants, dealers, and brokers. H.R. Rep. 1041, 71 Cong., 2d Sess. (1930). Its primary purpose was to provide a practical remedy to small farmers and growers who were vulnerable to the sharp practices of financially irresponsible and unscrupulous brokers in perishable agricultural commodities. *Widsey v. Guerin*, 443 F2d 584 (6th Cir. 1971); *O'Day v. George Arnelian Farms, Inc.*, 536 F2d 856 (9th Cir. 1976). "Accordingly, certain conduct by commission merchants, dealers, or brokers [was] declared to be unlawful. 7 USC § 499b." *Id.* at 858. Enforcement is effectuated through a system of licensing with penalties for violations. H.R. 1041, 71st Cong., 2d Sess. (1930) 3. See, also *George Weinberg & Son, Inc. v. Butz*, 491 F2d 988 (2nd Cir.), cert. denied, 19 US 830 (1974).

As noted above, the instant case is brought pursuant to section 8(c) of the PACA, 7 USC 499h(c). Since there have been few cases brought pursuant to that section of the Act, it is one which is virtually unique in the annals of the Department. Section 8(c) of the Act prohibits an applicant from obtaining a PACA license through the use of a false or misleading statement in the application therefor, or through a misrepresentation, concealment, or withholding of facts respecting any violation of the PACA by any officer, agent, or employee of the applicant. Licenses obtained in violation of this section may be revoked. At first passage, the PACA did not include such a prohibition. The purpose of amending the PACA to include it was to close a loophole in the original legislation which might have allowed a violator of the Act to obtain a license through some kind of subterfuge. H. Rep. No. 489, 73d Cong., 2d Sess. (1934).

A review of the reported decisions in cases brought pursuant to the PACA discloses that only two decisions on the merits have been entered in cases brought pursuant to section 8(c).²⁵ In the first case, *United Fruit Distributors, Inc.*, 24 Agric. Dec. 1234 (1965), the applicant falsely named a person who was not the corporation's president, treasurer and holder of 50% of its stock. In view of the

²⁵ See, also *Latin American Frt. and Shipping Corp.*, 14 Agric. Dec. 763 (1955), a case brought pursuant to § 8(c) in which the respondent failed to file an answer, and a default judgment was entered.

false and misleading statements on the application, and in view of the testimony that, had the Department been informed of the identity of the person who truly was the corporation's president, treasurer and 50% stockholder that a bond pursuant to section 4(e) of the PACA (7 USC 499d(e)), would have been required of the applicant before the corporation's license would have been issued, the corporation's license was revoked. In the second case, *Clara DeVault*, 25 Agric. Dec. 1389 (1966), the respondent, an individual, used a new name in applying for a PACA license without disclosing that she had been formerly licensed under a different name. In view of the fact that the new license which was issued to her would not have been issued without the posting of a surety bond had she disclosed in answer to the questions on the application that she had been previously licensed under another name, her new license was revoked.

It is alleged by the complainant that in applying for its license under the PACA, Perfect Potato Packers failed to disclose Weller's dominating control of and interest in all aspects of respondent's affairs. Had Weller's control and direction of respondent's affairs been revealed to the Department at the time that the corporation applied for its license, the license would not have been issued. Thus, under the two cases discussed above, Perfect Potato Packers' license should be revoked. The issues raised are discussed below.

A. Perfect Potato Packers, Inc., was merely an alter ego of Weller.

The evidence is clear that Weller was a potato dealer who had been licensed under the Act for a number of years. It is also clear that Weller's potato business was conducted through a bevy of corporate entities, and that, in the 1982-1983 time period, his businesses were having financial difficulties. In order to enable him to continue to function in the industry, Weller established Perfect Potato Packers as an alter ego through which he could sell potatoes to other dealers in the industry and conceal the proceeds from his creditors.²⁷ In addition, the establishment of PPP also enabled Weller to avoid problems with transportation companies arising out of his potato operation.²⁸

The evidence clearly establishes that, in applying for its PACA license, Perfect Potato Packers did not indicate that Weller had any involvement in the corporation. Rather, three other individ-

²⁷ The Department's investigator testified that Weller's bookkeeper, Mr. Stanley Karnisinski, told her that respondent purchased "all [the] potatoes from Mr. Weller because Mr. Weller didn't want his receivables attached." Hearing Transcript page 41.

²⁸ Hearing Transcript pages 174-177.

is (Benoit, Frasca and Sedar) were listed as responsibly connected with it. These three individuals were employees of Weller. They were operating pursuant to his direction and control at all times. Further, the record clearly establishes that Perfect Potato Packers was incorporated as a result of contacts which Weller or St. Salvatore Julian (a Weller employee) had with Phillip E. Taton, Jr., Esq., who was the attorney who prepared the paperwork by which the corporation was formed.

At no time was the corporate respondent ever operated independently of Weller's potato business. It operated from his building; indeed it shared his offices; none of its employees or agents were ever independent of Weller; it used his telephones; and another of Weller's business entities controlled all of the clerical work (including its payroll) involved in the operation of Perfect Potato Packers. All of the documentary evidence submitted into the record in this case supports the above assertions. None of the evidence submitted on behalf of the respondent supports the assertions of Weller and Frasca that Weller was not involved in the operation of Perfect Potato Packers.

The only conclusion which can be reached on the basis of the record adduced in this proceeding is that Perfect Potato Packers was merely an extension of Weller's potato enterprise. In fact, it was the alter ego through which he hoped to be able to continue to operate while he personally was under attack by his suppliers.

B. The respondent's PACA license contained a false and misleading statement in that Benoit and not Weller was reported as the owner of 100% of the corporation's stock.

The gravamen of the PACA violation with which respondent is charged is that it obtained its PACA license through the use of false and misleading statements on its application.

The application listed Marc G. Benoit as president, director and 100% stockholder.²²

In fact, no stock had been issued to anyone. Throughout this time, the corporate records were wrapped in the printer's sealed cellophane package and kept at Attorney Taton's office. No one has requested or instructed Attorney Taton to issue any of the stock.

The evidence here establishes that beneficial ownership of PPP's stock rested in Weller. Weller recognized this when he made his petition to the United States Bankruptcy Court for the District of Connecticut, certifying under penalty of perjury that he did busi-

²² Complainant's Exhibit 1.

ness as Richard Weller, Richard Weller Potatoes and Perfect Potato Packers.⁴⁰

In testimony here, Weller denied owning Respondent's stock. However, in the bankruptcy proceeding, Weller certified under penalty of perjury that he was owner of 100% of the outstanding stock of Perfect Potato Packers, Inc., a corporation which he told the court "was originally activated to handle Richard Weller Potato."⁴¹

In addition, in a sworn statement given to Complainant's investigator, Weller said that—

Perfect Potato Packers, Inc. was in reality only an extension of the Richard Weller operation and was *under my sole control, functioning at my direction and upon my instructions.*

Although in applying for a license under the Perishable Agricultural Commodities Act, it was shown that Marc Benoit held 100% of the stock, in reality no stock was issued to any individual, no organizational meeting was held and no officers or directors were ever elected.⁴² (emphasis added)

The record establishes beyond doubt that Benoit was not a stockholder of Respondent and that Weller held the primary beneficial interest in respondent's stock, activities, and existence.

Respondent's application for a PACA license was false in listing Benoit as 100% stockholder.

Further, respondent's application for a PACA license was misleading in that it failed to disclose in any way the dominating and controlling interest of Weller. Weller, without question, was the primary beneficiary of Respondent's existence and affairs, and dominated its every move.

At the time respondent submitted its application for a PACA license, there were three open reparation complaints pending against Weller.⁴³ Just one of these would have been fatal—Weller's alleged failure to pay for \$275,000.00 worth of potatoes.

The evidence establishes that had Complainant's licensing authorities been aware of Weller's relationship to Perfect Potato Packers, Inc., an investigation would have been conducted into this

⁴⁰ Complainant's Exhibits 16 and 17.

⁴¹ Bankruptcy schedule B-2, Question F [sic; should be Question t], page 7, lines 18-21, Complainant's Exhibit 17.

⁴² Complainant's Exhibit 18, page 1.

⁴³ Hearing Transcript pages 353-354.

application. Had Weller's dominating control and interest in the respondent corporation been known, the license application would have been carefully examined and checked.

The evidence establishes that had the full circumstances been known to complainant's licensing authorities, no license would have been issued to Respondent corporation.

Respondent's application for a license contained false and misleading statements which concealed Weller's domination and control of respondent's affairs. No license clearly would have been issued to respondent had complainant known the facts.

In deference to separate and independent proceedings to determine who are persons "responsibly connected" with a PACA licensee, this decision is narrowly based on the false and misleading statements made in the license application.

There appears to be no need here to now decide whether the corporate entity ought to be disregarded or whether it ever properly began to do business.

Further, for the same reasons, it is not intended to be decisive of any issue concerning the validity or occupancy of any reputed directors, officers or stockholders status or relationship to the respondent corporation.

It is sufficient here to determine that the application, as filed, falsely listed Marc Benoit as 100% stockholder and was misleading in the sense that it concealed the role of Weller in the corporate affairs.

Further, nothing in this decision should suggest that anyone here was a man of evil heart deliberately setting out to cheat and defraud.² Serious business difficulties existed for Weller which threatened the continued viability of the businesses.

² § 4(b) of the Act (7 USC 499(b)); 7 CFR 47.47.

³ Respondent, on motion to reconsider, notes this lack of intent "to cheat and defraud." This was perhaps a too generous effort to prevent people from jumping to conclusions that a criminal-style conspiracy was established by this evidence. Perhaps it was, but this decision should not imply that possibility to a casual reader.

The effort to exonerate the individuals from this type of implication should not be read out of context wherein the behavior here is described as "a desperate effort" intended to have the effect of making it more difficult, if not impossible, for people to collect money owed by Weller or his various businesses.

Respondent contends that in the absence of an "intent to defraud" no finding of "false and misleading statements" is possible. (emphasis added)

The statute permits any license obtained through "a false or misleading statement in the application . . ." to be revoked. § 8(c) of the Act, 7 USC 499(c), emphasis added.

It is respectfully submitted that the evidence here more than establishes the application as literally "false" and "misleading" to the complainant agency.

As a desperate effort to buy time and more operating room, the actions here were taken on a step-by-step basis. Filing the false application for a PACA license was one of those steps. It seems clear that each action and each individual participated in this matter with the idea that personal and business successes would follow, leading ultimately to full payment of all obligations. However, licensees under the Perishable Agricultural Commodities Act are not allowed to engage in such practices.

* * * * *

Respondent violated sections 3 and 8(c) of the PACA (7 USC §§ 496c and 499h(c)) and § 46.4 of the regulations (7 CFR § 46.4).

The only appropriate sanction under the binding precedents is revocation of the license.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent contends on appeal that the ALJ's key findings are not adequately supported by the record, but the record abundantly supports the ALJ's findings and conclusions. In fact, the proof here far surpasses the preponderance of the evidence, which is all that is required.⁴⁵

In addition, the ALJ, who saw and heard the witnesses testify, was in the best position to resolve the conflicts in testimony, and the conflicts between the testimony of certain witnesses, including Weller, and their prior contrary statements made under oath or penalty of perjury.⁴⁶ For example, in *Fairbank v. Hardin*, 429 F.2d 264, 268 (9th Cir.), *cert. denied*, 400 U.S. 943 (1970), the court, in affirming a decision by USDA's Judicial Officer, stated:

When the trier of the facts, as here, expresses a doubt on the validity of oral testimony, the reviewing authority should not substitute its own judgment for that of the Examiner unless his findings are hopelessly incredible or flatly contradict either a "law of nature" or undisputed documentary evidence. National Labor Relations Board v.

⁴⁵ See *Harmon & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981); *In re Rowland*, 40 Agric. Dec. 1334, 1941 n.5 (1981), *aff'd*, 713 F.2d 179 (9th Cir. 1983); *In re Gold Belt-J&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1346 (1978), *aff'd*, No. 78-8124 (D.N.J., May 25, 1979), *aff'd mem.*, 34 F.2d 770 (3d Cir. 1980).

⁴⁶ *Fairbank v. Hardin*, 429 F.2d 264, 268 (9th Cir.), *cert. denied*, 400 U.S. 943 (1970); *Great Western Food Distributors v. Brannan*, 321 F.2d 476, 479-80 (7th Cir.), *rt. denied*, 345 U.S. 997 (1953); *In re National Beef Packing Co.*, 36 Agric. Dec. 722, 1736 (1977), *aff'd*, 605 F.2d 1167 (10th Cir. 1979).

Dinion Coll Co., 201 F.2d 484, 490 (2d Cir. 1952); see also *United States v. Oregon Medical Society*, 343 U.S. 326, 339, 72 S.Ct. 690, 96 L.Ed. 978 (1952).

Respondent urges that there is no proof that a license was issued to respondent, or that the license number was 831032, as found by the ALJ. However, there is adequate evidence in the record to support the ALJ's finding of fact as to the issuance of the license, particularly in the absence of any evidence to the contrary (see the citations in note 3, *supra*). For example, respondent's APPLICATION FOR LICENSE filed May 16, 1983, has a block on the upper right-hand corner of the first page stating "FOR USDA USE ONLY," in which the figure 831032 is stamped, along with "05/26/84." I infer that the stamped number "831032" is the number of the license issued to respondent, and that the date of May 26, 1984, is the anniversary date on which the license was subject to renewal.⁴⁷

The ALJ properly held that there was no need to determine whether the corporate entity should be disregarded (Initial Decision at 25). But if such a determination were necessary, the issue would not be decided under Connecticut law, as contended by respondent (Appeal Petition at 12), but, rather, under Federal law. Under Federal law, the fact that Weller was the beneficial owner of 100% of the stock of respondent would be enough to invoke the doctrine of piercing the corporate veil.⁴⁸

Respondent argues that there was no intent to defraud, but intent to defraud is not at issue here. Respondent's license may be

⁴⁷ Complainant has belatedly attached a copy of PACA license no. 831032 issued to Perfect Potato Packers Inc., with an anniversary date of May 26, 1984, to its response to respondent's appeal filed December 16, 1985. If it were not for the fact that the record contains sufficient evidence to support the ALJ's finding as to the issuance of the license, I would have complainant file a copy of the license certified by the custodian thereof with the Hearing Clerk, and I would take official notice of the license, pursuant to the Department's rules of practice (7 CFR § 1.145(b)). (The Judicial Officer has, in a number of prior cases, taken official notice of records on file in the Department (see, e.g., *In re Saylor*, 44 Agric. Dec. ____ (slip op. at 625) Sept. 29, 1985).

⁴⁸ *Corn Products Ref. Co. v. Benson*, 232 F.2d 564, 565 (2d Cir. 1956). Accord *Seaboard Meat Co. v. Secretary of Agriculture*, 440 F.2d 963, 963-65 (5th Cir. 1971); *Bruhn's Freezer Meats v. USDA*, 438 F.2d 1332, 1342-43 (8th Cir. 1971); *Fairbank v. Hardin*, 429 F.2d 264, 265, 269 (5th Cir.), cert. denied, 409 U.S. 943 (1970); *Capitol Parking Co. v. United States*, 350 F.2d 67, 77-78 (10th Cir. 1965); *In re Jackson Union Stockyards, Inc.*, 37 Agric. Dec. 1583, 1540-42 (1973), *aff'd mem.*, 597 F.2d 779 (3d Cir. 1979); *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547, 565-68 (1977), *aff'd* *sub nom. Van Wyk v. Bergland*, 570 F.2d 701 (6th Cir. 1978); *In re Livestock Marketing, Inc.*, 35 Agric. Dec. 1552, 1559-61 (1978), *aff'd per curiam*, 568 F.2d 748 (5th Cir. 1977), cert. denied, 435 U.S. 968 (1978); *In re Bouman*, 25 Agric. Dec. 1074, 1089-90 (1964), *aff'd*, 258 F.2d 81, 84, 86 (5th Cir. 1960).

revoked if "the license was obtained through a false or misleading statement in the application therefor" (7 U.S.C. § 499h(c)). As shown by the ALJ, the license application was false and misleading. In addition, if it were necessary to show intent to defraud, this was shown here. The record here warrants the inference that respondent corporation was created to defraud creditors (in the short run)⁴⁹ and to defraud the Secretary by concealing Weller's ownership on the application for a license (because of his payment difficulties that would have prevented him from obtaining a new license in his own name).

Respondent argues that its license expired and, therefore, it cannot now be revoked. But the congressional authorization to revoke a license obtained through a false or misleading statement in the application therefor is not limited to revoking a license in effect when the final order is issued (see 7 U.S.C. § 499h(c)).⁵⁰ The license was subject to renewal on May 26, 1984 (CX 1, p. 1), and therefore, it was in effect when the complaint was filed on May 16, 1984. But irrespective of whether it was still in effect when the complaint was issued, a license which has been allowed to expire can, nonetheless, be revoked or suspended in appropriate circumstances.⁵¹

For the foregoing reasons, the following order should be issued

ORDER

Respondent's license is revoked.

⁴⁹ This defrauding of creditors in the short run was undertaken to shield respondent's cash flow from creditors so that, hopefully, in the long run, respondent would be able to pay all creditors in full.

⁵⁰ If there were such a limitation in the Act, it would seriously undermine the congressional purpose in this respect since licenses expire on their anniversary date unless renewed, and it takes longer than a year to complete a revocation

The facts and circumstances as set forth herein shall be published.

This order shall take effect on the 30th day after service thereof on respondent.

Edendum:

Pertinent Statutory and Regulatory Provisions, pages i, ii.

PERTINENT STATUTORY AND REGULATORY PROVISIONS

1. Section 3 of the PACA (7 U.S.C. § 499c) provides, in pertinent part, that:

(a) * * * no person shall at any time carry on the business of a commission merchant, dealer, or broker without a license valid and effective at such time. * * *

(b) any person desiring any such license shall make application to the Secretary. The Secretary may by regulation prescribe the information to be contained in such application and to be furnished thereafter. * * *

2. Section 46.4 of the Regulations issued pursuant to the PACA (7 CFR § 46.4), in pertinent part, provides as follows:

(a) Any person desiring to obtain a license shall make application therefor on the currently approved form to be obtained from the Director or his representatives.

(b) The applicant shall furnish the following information:

(1) name or names in which business is conducted; place of business; mailing address; name, location and number of branches or additional business facilities, divisions or affiliates; name of firm succeeded and whether the applicant assumes responsibility of settling any complaints filed under the Act against the firm succeeded.

* * *

(3) *Type of ownership:* If a corporation, applicant shall furnish: (i) The month, day and year incorporated; (ii) the State in which incorporated; (iii) the name in which incorporated, and (iv) the address of the principal office.

(4) *Full legal name, all other names used, if any, and home address of the owner.* If a partnership, the applicant shall furnish the full legal names, all other names used, if any, and home address of all partners, indicating whether

general, limited or special partners; or if an association or corporation the applicant shall furnish the full legal names, all other names used, if any, and home address of officers, directors and holders of more than 10 per centum of the outstanding stock and percentage of stock held by each such person.

* * * * *

(6) Whether the applicant, or in case the applicant is a partnership, any partner, or in case the applicant is an association or corporation, any officer, director, or holder of more than 10 per centum of the outstanding stock, has prior to the filing of the application:

* * * * *

(iii) Been an officer, director, stockholder, partner, or owner of a firm against which there is a pending complaint under the act known to the applicant. If so, he shall furnish the name and address of the firm against which there is a pending complaint;

* * * * *

(c) The application shall be signed by the owner, all general partners, or, in case the applicant is an association or corporation, a duly authorized official.

Section 8(c) of the PACA (7 U.S.C. 499h(c)) provides that:

..

In re: STANLEY and JOE RUSSO. PACA Docket 2-6897. Decided December 19, 1985.

Sophia Luparella, for complainant.
Respondent, pro se.

Decision by Victor Palmer, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on July 23, 1985, by the Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period February 1984 through January 1985, respondent purchased, received, and accepted, in interstate and foreign commerce, from 10 sellers, 25 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$287,959.60.

A copy of the complaint was served upon respondent which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. Respondent, Stanley & Joe Russo, is a partnership comprised of Joe N. Russo and Stanley Russo, whose address is 1168 East 37th Street, Brooklyn, New York 10474.

2. Pursuant to the licensing provisions of the Act, license number 771200 was issued to respondent on May 3, 1977. This license was renewed annually, but terminated on May 3, 1985, pursuant to Section 4(a) of the Act (7 U.S.C. § 499d(a)), when respondent failed to pay the required annual license fee. However, respondent's license was automatically suspended on January 2, 1985, pursuant to Section 7(d) of the Act (7 U.S.C. § 499g(d)), when it failed to satisfy a reparation award issued by the Secretary. See PACA Docket No. RD-85-24 (44 Agric. Dec. ____).

3. As more fully set forth in paragraph 5 of the complaint, during the period February 1984 through January 1985, respondent purchased, received, and accepted in interstate and foreign commerce, from 10 sellers, 25 lots of fruits and vegetables, all being

perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$287,969.60.

CONCLUSIONS

Respondent's failure to make full payment promptly with respect to the 25 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. § 499b), for which the Order below is issued.

ORDER

A finding is made that respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b), and the facts and circumstances set forth above, shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. # 1.139 and 1.145).

Copies hereof shall be served upon parties.

[The Decision and Order became final on February 19, 1985.--Ed.]

MISCELLANEOUS DISCIPLINARY DECISIONS

In re: TRI-COUNTY WHOLESALE PRODUCE CO. INC. PACA Docket No. 2-6300. Decided February 28, 1986.

Dennis Becker, for complainant.

Stephen McCarron, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

STAY ORDER

The order previously issued in this case is hereby stayed pending the outcome of proceedings for judicial review.

REPARATION DECISIONS

MISSION FRUIT & VEGETABLES DISTRIBUTORS, INC. v. CAL-MEX DISTRIBUTORS, INC. PACA Docket No. 2-6772. Decided January 16, 1986.

Consignment—duty to deal in expeditious and reasonable manner with perishable produce—Accounting—constructed accounting by Department's investigator accepted as most accurate indication of true value of produce.

Respondent accepted a consignment of cucumbers from complainant and dealt with a substantial portion of the cucumbers in a dilatory manner. Also respondent's accounting to complainant was found by the Department's investigator to be inaccurate. The constructed accounting made by the Department's investigator was used as the basis of an award of reparation to complainant.

E. Leigh Larson, Nogales, Arizona, for complainant.
Respondent, pro se.

George S. Whitten, Presiding Officer.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a et seq.). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$3,571.20 in connection with the shipment in interstate commerce of one truckload of cucumbers.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed \$15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements, however, neither party did so. Both parties filed a brief.

FINDINGS OF FACT

1. Complainant, Mission Fruit & Vegetables Distributors, Inc., is a corporation whose address is P.O. Box 1268, Nogales, Arizona.
2. Respondent, Cal-Mex Distributors, Inc., is a corporation whose address is P.O. Box 1717, Chula Vista, California. At the time of

the transaction involved herein respondent was licensed under the Act.

3. On or about November 18, 1983, complainant consigned to respondent and shipped to respondent in Chula Vista, California, from loading point in the state of Arizona, one truckload containing 648 crates of select cucumbers, and 144 crates of small cucumbers. It was agreed that respondent would be paid \$.15 per crate as a selling fee.

4. Respondent accepted the cucumbers on arrival, and on February 23, 1984, issued the following accounting to complainant:

2/23/84	36 CUCUMBERS	5.50	198.00
	72 CUCUMBERS	5.00	360.00
	684 CUCUMBERS (RETURNED)	0	0
	792 HANDLING CHARGES	.15	<u>118.80</u>
	TOTAL:		8439.20

5. On October 3, 1984, a personal investigation was conducted by an employee of this Department of Agriculture at the place of business of respondent in Chula Vista, California. This investigation showed that the 684 crates of cucumbers shown on respondent's accounting as returned were shipped to the Los Angeles area on December 3, 1983. Other than in the bill of lading showing the above shipment there was no documentation in respondent's records showing the disposition of the 684 crates of cucumbers. Mr. Villalobos, respondent's president, stated that the entire lot of 684 crates of cucumbers had been dumped by the ultimate receiver in Los Angeles. The Department's investigator constructed an accounting based upon Market News Service reports for Los Angeles on December 5, 1983. It was assumed that 144 of the 684 crates shipped to Los Angeles were the small cucumbers, and these cucumbers were assigned a value of the basis of the Market News reports of \$3.00 per crate. The remaining 612 crates were assigned a value on the basis of the Market News reports of \$5.00 per crate, and the investigator's accounting showed a total due, after a deduction of \$.15 per crate as a handling charge, of \$3,571.20 for all the cucumbers consigned to respondent.

6. Respondent issued complainant a check in the amount of \$439.20 along with its accounting on February 24, 1984. Complainant never cashed this check. Respondent issued complainant an additional check along with its answer on February 9, 1985, in the amount of \$360.00. Complainant never cashed this check.

1. An informal complaint was filed on May 10, 1984, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

In its answer to the formal complaint respondent admitted that the accounting rendered to complainant in February of 1984, was incorrect. Respondent stated that it inadvertently failed to report 648 cucumbers sold to Milton Poulos on November 28, 1983, at \$1.00 per crate for a total of \$648.00. According to documentation submitted along with respondent's answer the remaining 324 crates of cucumbers were sent to Caballero Produce Company in Los Angeles on December 3, 1983, and were subsequently dumped. A federal inspection dated December 5, 1983, covering 324 crates of cucumbers at the place of business of Caballero Produce Company in Los Angeles was also included as an exhibit to the respondent's answer. This inspection report showed condition factors as follows: "Mostly fresh and firm. From 10 to 40%, average 26% yellowing. From 6 to 16%, average 12% various decays in various stages."

We are not favorably impressed with respondent's efforts, well over one year after having been consigned the subject cucumbers, to render an accounting for the 648 crates of cucumbers which it had first reported to have been returned, and subsequently reported orally to the Department's investigator to have been dumped. Regardless of the fact that this last accounting of the cucumbers by respondent may in fact be true, such accounting shows that respondent was dilatory in its dealing with the cucumbers. Perishable produce should not be allowed to sit in a warehouse for 10 to 15 days before it is shipped to another state for the purpose of being resold. See *Collins Bros. Produce Co. v. Dixieland Produce*, 38 Agric. Dec. 1031 (1979). We accept the constructed accounting of the Department's investigator as the most accurate indication available to us of the true value of the cucumbers. We find that respondent's failure to pay complainant the sum of \$3,571.20 is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

Respondent's attempted defense based on the allegation that the cucumbers were sent to it without its authorization after it had been contacted by complainant with a request to receive the cucumbers on consignment has been considered by us and is deemed inadequate. Respondent was not required to accept the cucumbers when they arrived at its place of business if it had not contracted previously to take them. When respondent did accept the cucumbers it incurred an obligation to deal with them in an expeditious and reasonable manner.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$3,571.20, with interest thereon at the rate of 13 percent per annum from January 1, 1984, until paid. Copies of this order shall be served upon the parties.

H. SMITH PACKING CORPORATION v. CHRIS SPIRIDIS d/b/a EASTERN FARMERS EXCHANGE COMPANY. PACA Docket No. 2-6778. Decided January 16, 1986.

Delivered sale—breach of contract as to condition and variety—Damages—failure to prove—Federal inspection—failure to prove produce covered by inspection same as produce received from complainant.

Complainant sold three truckloads of potatoes to respondent on a delivered basis. Respondent accepted the potatoes and proved a breach of contract as to two loads but failed to prove damages as to either load. Respondent failed to prove a breach as to the remaining bulk load of potatoes because such potatoes could not be identified with those covered by a federal inspection report submitted by respondent. Respondent also failed to prove damages as to the remaining load of potatoes.

Complainant, *pro se*.

Frank J. Johnson, East Islip, New York, for respondent.

George S. Whitten, Presiding Officer.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$14,959.87 in connection with the shipment in interstate commerce of three truckloads of potatoes.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant and asserting a set-off in the amount of \$12,000 arising out of the same transactions as those alleged in the formal complaint. Complainant filed a reply to the set-off denying any liability to respondent.

The amount claimed in neither the formal complaint nor setoff exceeds \$15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is appli-

cable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement. Respondent did not file an answering statement. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, H. Smith Packing Corporation, is a corporation whose address is P.O. Box 189, Blaine, Maine.

2. Respondent is an individual, Chris Spiridis, doing business as Eastern Farmers Exchange Company, whose address is 11 Runyan Street, Bayshore, New York. At the time of the transactions involved herein respondent was licensed under the Act.

3. On or about June 8, 1984, complainant sold to respondent 500 50 lb. master containers of 5 lb. poly bags of U.S. No. 1 round white potatoes at \$6.00 per master container; 200 50 lb. master containers of 10 lb. poly bags of U.S. No. 1 round white potatoes at \$5.30 per master container; and 200 50 lb. paper bags of U.S. No. 1 round white potatoes at \$4.25 per bag, for a total price of \$4,910.00, delivered, to respondent's place of business in Deer Park, New York.

4. On or about June 8, 1984, complainant shipped from loading points in the State of Maine to respondent in Deer Park, New York 500 50 lb. master containers of 5 lb. poly bags of long russet potatoes; 200 50 lb. master containers of 10 lb. poly bags of long russet potatoes; and 200 50 lb. bags of U.S. No. 1 round white potatoes. The potatoes arrived at destinations on Monday, June 11, 1984, and were unloaded by respondent and placed in respondent's warehouse.

5. On or about June 9, 1984, complainant sold to respondent, and shipped from loading point in the State of Maine to respondent in Deer Park, New York, 57,820 pounds of bulk washed U.S. No. 1 russet Burbank potatoes at \$10.35 per hundredweight, delivered, for a total price of \$5,984.37. The potatoes arrived at destination on Sunday, June 10, 1984, and were unloaded by respondent and placed in respondent's warehouse.

6. On or about June 11, 1984, complainant sold to respondent 200 50 lb. master containers of 5 lb. poly bags of U.S. No. 1 round white potatoes at \$6.00 per master container; 175 50 lb. master containers of 10 lb. poly bags of U.S. No. 1 round white potatoes at \$5.30 per master container; and 450 50 lb. paper bags of U.S. No. 1 round white potatoes at \$4.25 per bag; for a total price of \$4,065.50, delivered, to respondent's place of business in Deer Park, New York.

7. On or about June 11, 1984, complainant shipped from load points in the state of Maine to respondent in Deer Park, New York 200 50 lb. master containers of 5 lb. poly bags of long russet potatoes; 175 50 lb. master containers of 10 lb. poly bags of long russet potatoes; and 450 50 lb. bags of U.S. No. 1 round white potatoes. The potatoes arrived at destination on Tuesday, June 12, 1984, and were unloaded by respondent, and placed in respondent's warehouse.

8. On June 13, 1984, at 10:00 a.m. a federal inspection was made of bulk potatoes in respondent's warehouse with the following results in relevant part:

Products Inspected:	Long Russet Potatoes in bulk with no distinguishing marks. Applicant states: 57,000 Lbs.
Condition of Load:	2 to 5 feet in height.
...	
Temperature of Product:	Range 70 to 76°F.
...	
Condition:	77% Bacterial Soft Rot mostly advanced. Sound potatoes, adjacent decayed potatoes, are wet and smeared with decayed tissue.
...	
Remarks:	Applicant states stock unloaded from trailer lic. 75-047 Me.

9. On June 13, 1984, at 2:15 p.m. another federal inspection was made of potatoes in respondent's warehouse. This inspection showed in relevant part as follows:

Products Inspected:	Long Russet Potatoes in fiberboard cartons containing 5-10 lb or 10-5 poly bags branded "5 lbs net, US No. 1" or "10 lbs net, US No. 1 Round White Vacationland Maine Potatoes, packed by H.Smith Packing Corp., Mars Hill Maine 04758." Applicant's count 353 5-10 lb. master cartons 700 10-5 lb. master cartons.
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...
Temperature of Product: Range 70 to 76°F.

...
Condition: 10 lb lot: From 3 to 25%, average 13%
Bacterial Soft Rot in various stages.
Remainder firm. 5 lb lot: Generally
firm. From 1 to 18%, average 6%
Bacterial Soft Rot.

...
Remarks: Applicant states stock unloaded from
trailer lic. no. 494930 84s. and 7907-
RI

10. The formal complaint was filed on December 24, 1984, which was within nine months after the causes of action alleged herein accrued.

CONCLUSIONS

Complainant brings this action to recover the purchase price of the three truckloads of potatoes accepted by respondent totalling \$14,959.87, no part of which has been paid. Respondent alleges that complainant breached the contract of sale in regard to each of the loads of potatoes, and that instead of owing complainant any part of the purchase price, complainant is indebted to respondent for losses on the three loads of potatoes in the total amount of \$12,000.00.

First, we note that as to the first load and third load of potatoes respondent admits that the 50 lb. bags of round white potatoes were received in good condition. Respondent asserts that the remaining master containers of poly bags were received in an abnormally deteriorated condition. Complainant alleges that the high temperatures shown by the federal inspection of these potatoes is responsible for the excessive decay, which amounted to an average of 13% in the 10 lb. poly bags and 6% in the 5 lb. poly bags. One portion of the master containers arrived on June 11, at 6:00 a.m., and other portion arrived on June 12, at 6:00 a.m. Both portions of potatoes were jointly inspected at 2:15 p.m. on June 13, 1984. In view of the fact that this was a delivered sale, making complainant responsible for the potatoes during transit and requiring delivery in good condition, we find that the length of time between arrival

and inspection was not long enough to account for the excessive decay shown by the federal inspection even though temperatures were high. We find that complainant breached the contract of sale as to the master containers of potatoes. In addition it is obvious that complainant breached the contract of sale as to the variety of potatoes delivered in the master containers.

Although respondent alleged a loss resulting from complainant's breach of contract, and submitted a statement of expenses in an attempt to document such loss, respondent nowhere submitted an accounting covering the resale of any of the potatoes which are the subject of this proceeding. Respondent's "statement of expenses" contains no data whatsoever showing the amount for which the potatoes were resold. In the absence of this data we are unable to award respondent any damages for complainant's breach. See *Anthony Brokerage, Inc. v. The Auster Company, Inc.*, 38 Agric. Dec. 1643 (1979); *Relan Produce Farms v. Rushton & Co., Inc.*, 38 Agric. Dec. 1636 (1979); and *Genbroker Corp. v. Super Food Services*, 38 Agric. Dec. 83 (1979).

In an effort to prove a breach of contract as to the second load of potatoes respondent submitted the federal inspection referred to in finding of fact 8. Complainant objected strenuously to this inspection on the grounds that the potatoes covered by the inspection could not be identified with the bulk load of potatoes shipped by complainant. Although respondent submitted documentation in an effort to show that no potatoes other than complainant's were on hand during the time period in question, such documentation does not cover bulk potatoes, but only potatoes in poly bags or 50 lb. paper bags. We conclude that respondent has failed to prove a breach of contract in regard to the bulk load of potatoes. In addition we note that even had respondent proved a breach in regard to the bulk load of potatoes respondent also failed to prove damages as to these potatoes.

Respondent accepted the three loads of potatoes shipped by complainant, and has failed to prove any damages with respect to any of the loads. Consequently, respondent is liable to complainant for the full purchase price thereof, or \$14,959.87. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest. Respondent's set off, of course, cannot be allowed.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, \$14,959.87, with interest thereon at the rate of 13% per annum from July 1, 1984, until paid.

Copies of this order shall be served upon the parties.

H. SCHNELL & COMPANY, INC. v. GREEN VILLAGE FRUIT & VEGETABLE CO. INC. PACA Docket No. 2-6088. Decided January 16, 1986.

Reparation award for unpaid produce.

In re Green Village Fruit & Vegetable Co. Inc. PACA Docket No. 2-6088 signed by Donald A. Campbell, Judicial Officer; Andrew Stanton, Presiding Officer. Complainant sought reparation against respondent for a shipment of produce not paid for. Presiding Officer wrote respondent's counsel to show cause why a reparation order should not be issued. Receiving no reply, respondent was thus ordered to pay complainant \$144,377, with 13% interest annually until paid.

Complainant, *pro se*.

G. Oliver Koppell, New York, N.Y., for respondent.

Andrew Stanton, Presiding Officer.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$144,377.00 in connection with a shipment of produce in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto.

In paragraph 8 of its answer, respondent denied complainant's allegations that it failed to pay for the produce and currently owes \$144,377.00, but qualified such denial by adding "in that respondent did not willfully or knowingly commit any violations" of the act. Respondent qualified its denial even further in paragraph 3A, stating that "it intends to remain current in its obligations to complainant in the future and is currently in the process of arranging to make payment to complainant." In a letter to respondent's counsel dated November 5, 1985, the Presiding Officer noted that the answer appeared to admit liability, and gave respondent's counsel 10 days from its receipt of the letter to show cause why a reparation order against respondent should not be issued in the amount alleged in the complaint. No response was received by the Department. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, H. Schnell & Company, Inc. is a corporation whose address is 243 New York City Terminal Market, Bronx, New York. Respondent, Green Village Fruit & Vegetable Co., Inc., is a corporation whose address is 220A New York City Terminal Market, Bronx, New York. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of \$144,377.00. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation \$144,377.00, with interest thereon at the rate of 13 percent per annum from April 1, 1985, until paid.

Copies of this order shall be served upon the parties.

CAL-MEX DISTRIBUTORS, INC., v. FOUR C'S PACKING CO. PACA
Docket No 2-7002. Decided January 17, 1986.

Payment of undisputed amount.

Decision by Donald A. Campbell, Judicial Officer.

ORDER REQUIRING PAYMENT OF UNDISPUTED AMOUNT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely formal complaint was filed on May 24, 1985, in which complainant seeks to recover \$2,597.50 which amount is alleged to be the unpaid portion of the purchase price for cucumbers sold to and accepted by respondent in March and April, 1985. Respondent filed an answer to the formal complaint on October 28, 1985, admitting that \$2,001.50 of the amount claimed by complainant was due and owing to complainant on account of the transactions involved herein.

Section 7(a) of the Act (7 U.S.C. 499(a)) provides in part:

If after the respondent has filed his answer to the complaint, it appears therein that the respondent has admitted liability for a portion of the amount claimed in the complaint as damages, the Secretary . . . may issue an order directing the respondent to pay the complainant the undisputed amount . . . leaving the respondent's liability for the disputed amount for subsequent determination.

Accordingly, under the authority of the above quoted section, respondent shall pay to complainant, as an undisputed amount, \$2,001.50. Payment of this amount shall be made within 30 days from the date of this order with interest thereon at the rate of 18 percent per annum from May 1, 1985, until paid. A failure to pay his amount within 30 days will constitute a violation of section 2 of the Act. 7 U.S.C. 499b.

Respondent's liability for payment of the disputed amount is left for subsequent determination in the same manner and under the same procedure as if no order for the payment of the undisputed amount had been issued.

Copies of this order shall be served upon the parties.

DOM LANGE COMPANY, INC. v. METROPLEX PRODUCE COMPANY.
PACA Docket No. 2-7015. Decided January 17, 1986.

Payment of undisputed amount.

Decision by Donald A. Campbell, Judicial Officer.

ORDER REQUIRING PAYMENT OF UNDISPUTED AMOUNT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A reply complaint was filed on August 16, 1985. Complainant seeks to recover \$13,063.25, which amount is alleged to be the outstanding balance for mixed produce sold to and accepted by respondent between January 16 and May 1, 1985. Respondent filed an answer to the formal complaint on November 14, 1985, admitting that \$2,211.50 of the amount claimed by complainant was due and owing to complainant on account of the transactions involved herein.

Section 7(a) of the Act (7 U.S.C. § 499g(a)) provides, in part:

If after the respondent has filed his answer to the complaint, it appears therein that the respondent has admitted liability for a portion of the amount claimed in the complaint as damages, the Secretary . . . may issue an order directing the respondent to pay the complainant the undisputed amount . . . leaving the respondent's liability for the undisputed amount for subsequent determination.

Accordingly, under the authority of the above quoted section, respondent shall pay to complainant, as an undisputed amount, \$2,211.50. Payment of this amount shall be made within 30 days

from the date of this order with interest thereon at the rate of 13 percent per annum from June 1, 1985, until paid. A failure to pay this amount within 30 days will constitute a violation of section 2 of the Act, 7 U.S.C. § 499b.

Respondent's liability for payment of the disputed amount is left for subsequent determination in the same manner and under the same procedure as if an order for the payment of the undisputed amount had been issued.

Copies of this order shall be served upon the parties.

TREE FRUIT MARKETING, INC. v. WEST COAST PRODUCE SALES, INC.
PACA Docket No. 2-7027. Decided February 4, 1986.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$1,850.00 in connection with a shipment of apples in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Procedure of the
APR 1986

Copies of this order shall be served upon the parties.

PACIFIC FRUIT, INC. v. PETER J. BONAFEDE d/b/a J. BONAFEDE &
SONS. PACA Docket No. 2-6746. Decided February 10, 1986.

Probative value of prompt invoice—Failure to secure neutral inspection—Accord and satisfaction—express notice that proffered payment is conditioned upon acceptance as full satisfaction, necessary element of.

Where respondent failed to make timely objection to complainant's invoice, respondent's evidence was found insufficient to show contract price different from that shown on invoice or to show consignment rather than f.o.b. sale. Respondent's failure to secure neutral inspection precluded proof of chilling injury to bananas, and words on payment check cashed by complainant—"If incorrect please return", did not show that proffered payment was conditioned upon acceptance of check as full satisfaction of indebtedness.

George S. Whittes, Presiding Officer.

Complainant, pro se.

Frank V. Charles, Chelsea, Mass., for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$5,292.00 in connection with the shipment in interstate commerce of five truckloads of bananas.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant. Respondent's answer included a counterclaim in the amount of \$13,919.43 arising out of the same transactions. Complainant filed a reply to the counterclaim denying any liability thereunder.

Since amount claimed in both the formal complaint and the counterclaim does not exceed \$15,000.00, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, re-

spondent filed an answering statement, and complainant filed a statement in reply. Respondent also filed a brief.

FINDINGS OF FACT

1. Complainant, Pacific Fruit, Inc., is a corporation whose address is 19 Rector Street, New York, New York.
2. Respondent, Peter J. Bonafede, is an individual doing business as J. Bonafede & Sons, whose address is 15-16 New England Produce Center, Chelsea, Massachusetts. At the time of the transactions involved herein respondent was licensed under the Act.
3. On or about September 30, 1983, complainant sold to respondent, and shipped from loading point at the port of Newark, New Jersey to respondent in Chelsea, Massachusetts, three truckloads of bananas, each containing 950 boxes at \$8.00 per box, plus a handling charge of \$.36 per box, and a fuel surcharge of \$.37 per box, for a total invoice price for the three truckloads of \$24,880.50, f.o.b.
4. On or about December 24, 1983, complainant sold to respondent, and shipped from loading point in the port of Newark, New Jersey to respondent in Chelsea, Massachusetts, two truckloads of bananas, one containing 920 containers at \$6.00 per container, and the other containing 814 containers at \$6.00 per container, plus \$.40 per container for a handling charge, and \$.37 per container for a fuel surcharge, or a total invoice price for the two truckloads of \$11,739.18, f.o.b.
5. Respondent accepted the three truckloads of bananas shipped on September 30, 1983, and has paid complainant \$22,030.50, leaving a balance still due and owing of \$2,850.00.
6. Respondent accepted the two truckloads of bananas shipped on December 23, 1983, and has paid complainant \$9,297.18, leaving a balance still due and owing of \$2,442.00.
7. The informal complaint was filed on February 7, 1984, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

Respondent has raised a number of defenses to complainant's action. First, respondent claims that two of the truckloads sold on September 30, 1983, were not sold at \$8.00 per box, but rather were to be priced at \$1.00 per box less than the prevailing market price for a different brand of bananas. Second, respondent contends that the third load shipped on September 30, 1983, was not sold, but was consigned by complainant to respondent. Respondent lays great stress upon the fact that "complainant did not issue a confirmation of sale stating the quality of the bananas to be shipped or the prices agreed upon for the bananas shipped etc." We are frankly at

s loss to understand why this point was raised by respondent as a defense. The record clearly establishes that complainant promptly issued invoices stating the quantities and prices of the bananas, and nowhere does respondent deny receiving such invoices. Neither does the record show that respondent objected promptly to the invoices received. The duty to issue a "confirmation of sale" is placed by the regulations upon brokers. In any event the invoices sent by complainant accomplished the same purpose as a "confirmation of sale". We have carefully considered all of the evidence submitted by both parties in regard to the two shipments in question and have no hesitation in finding that respondent has failed to meet its burden of proof in regard to his allegation of a different pricing arrangement than that reflected in the invoice sent by complainant. As to the third load of bananas shipped on September 30, 1983, respondent contends that such bananas were not sold, but rather were consigned to respondent by complainant. This load was, of course, also included on the same invoice as the other two loads, and such invoice clearly shows this load was sold at the same price as the other two loads. Again, we have examined all of the evidence submitted by the parties, and we conclude that respondent has failed to meet its burden of proving that this load was consigned by complainant.

As to the two loads shipped on December 23, 1983, complainant so promptly invoiced respondent for the prices shown in the findings of fact. Respondent again contends that there was a different pricing agreement. However, respondent has not shown that it objected promptly to complainant's invoice, and we find the other evidence submitted by respondent in an effort to prove a separate pricing agreement to be unconvincing.

Respondent also alleges that some of the bananas which it received had been damaged by chilling injury. However, respondent admitted no inspection by a neutral party to establish the extent of fact of such injury. Consequently this defense can be given no credence. See *Mutual Vegetable Sales v. Select Distributors*, 38 Agric. Dec. 1359 (1979).

Respondent raises as an additional defense the allegations that there was an accord and satisfaction between the parties as a result of complainant's acceptance of the two checks sent by respondent in payment of the two invoices. In *National Produce Distributors, Inc. v. Stewart Produce Company*, 21 Agric. Dec. 955 (1962) we stated "... to establish an accord and satisfaction, payment should be offered in full satisfaction of the demand, and be accompanied by acts and declarations amounting to express notice that the payment is conditional, and, if accepted, must be received

in satisfaction of the claim." Respondent asserts that because the checks had the printed words "if incorrect please return", complainant's acceptance of such checks accomplished an accord and satisfaction. This is clearly not the case. The elements of an accord and satisfaction have not been proven by the respondent.

Respondent accepted the five truckloads of bananas, and thus became liable to complainant for the full purchase price thereof, or \$36,619.68. Of this amount respondent has already paid complainant \$31,327.68, which leaves a balance still due and owing of \$5,292.00. Respondent's failure to pay complainant this amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest. The counterclaim, since it arose out of the same transactions which were the subject of the complaint, should be dismissed.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation \$5,292.00, with interest thereon at the rate of 18 percent per annum from January 1, 1984, until paid. The counterclaim is dismissed.

Copies of this order shall be served upon the parties.

George S. Whitten, Presiding Officer.

Marilyn Carno, New York, N.Y., for complainant.

Richard Goe, Yalesville, Calif., for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$4,320.00 in connection with the shipment in interstate commerce of one truckload of bananas.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant. Respondent's answer included a counterclaim arising out of the same transaction as that which was the subject of the complaint. Complainant filed a reply to respondent's counterclaim denying any liability thereunder. The amount claimed in neither the formal complaint nor counterclaim exceeds 15,000, and the shortened method of procedure provided in section 7.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements, however, neither party did so. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Chiquita Brands, Inc., is a corporation whose address is 15 Mercedes Drive, Montvale, New Jersey.

2. Respondent, J. Williams, Jr. Co., Inc., is a corporation whose address is 116 Harrison Road, Wallingford, Connecticut. At the time of the transaction involved herein respondent was licensed under the Act.

3. On or about March 1, 1984, complainant sold to respondent one truckload containing 900 boxes of bananas at four dollars per box, plus a fuel surcharge of \$360, and handling charges of \$360, for a total amount of \$4,320.00, f.o.b.

4. On or about March 1, 1984, complainant shipped the bananas from loading point in the state of New York to respondent in the

State of Connecticut. The bananas were imported from the country of Costa Rica.

5. The bananas arrived at respondent's place of business on or about March 2, 1984, and were unloaded by respondent. Respondent has not paid complainant any part of the purchase price of the bananas.

6. The formal complaint was filed on October 15, 1984, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

Although respondent denies acceptance of the 900 boxes of bananas it is evident that respondent unloaded such bananas from the truck, and resold a portion of the bananas. We have held many times that such actions constitute sufficient exercise of dominion and control over produce so as legally to amount to an acceptance. See *Santa Clara Produce v. Caruso Produce Inc.*, 41 Agric. Dec. 2279 (1982) and *Crown Orchard Co. v. Mid-Valley Prod. Corp.*, 34 Agric. Dec. 1381 (1975). Having accepted the bananas respondent became liable to complainant for the full purchase price thereof less any damages caused by any breach of contract proved by respondent.

Respondent alleges that complainant breached the contract of sale by shipping bananas of extremely poor quality. Respondent's president, Joseph Williams, III, stated in a sworn affidavit that he personally inspected the bananas after their arrival and found that they were "of very poor quality in that they were of poor color, old, scarred and generally unsalable." We have often discounted testimonial evidence concerning the condition of perishable commodities, and stated the necessity of obtaining a neutral inspection showing the exact extent of damage. See *Mutual Vegetable Sales v. Select Distributors*, 38 Agric. Dec. 1359 (1979); *G. J. Albert, Inc. v. Salvo*, 26 Agric. Dec. 240 (1977); *Salt Lake Produce Co., Inc. v. Butte Produce Co., Inc.*, 32 Agric. Dec. 1732 (1973); *B. G. Anderson Company, Inc. v. Mountain Produce Co.*, 29 Agric. Dec. 513 (1970); and *O. D. Huff, Jr., Inc. v. Pagano & Sons*, 21 Agric. Dec. 385 (1962). We conclude that respondent has not met its burden of proving that the bananas failed to make good delivery on arrival.

Respondent's president also asserted that after noting the poor quality of the bananas he contacted complainant's area sales representative who stated that respondent "should keep the shipment, do with it what respondent could and he, the sales representative, would deal with it later." Assuming that this allegation by respondent's president is true, there is nothing in the alleged statement of respondent's sales representative from which we could con-

true a settlement of any dispute between the parties, or which would authorize respondent paying for the bananas at less than contract price. Words such as "do the best you can", "the buyer would work it out", "handle best possible", or "handle to best advantage" do not constitute permission to handle a shipment on a consignment basis. See *Relan Produce Farms v. Rushton & Co., c.*, 38 Agric. Dec. 1636 (1979); *Barkley Company of Arizona v. co, Inc.*, 31 Agric. Dec. 279 (1972); *Frank Gaglione & Son v. eron Hooker Co.*, 30 Agric. Dec. 528 (1971); and *Ralph Samsel v. Gillarde Sons Co.*, 19 Agric. Dec. 374 (1960).

Respondent accepted the bananas and has not proved a breach of contract on the part of complainant, nor has respondent proved that the contract was modified after acceptance. Accordingly, respondent is liable to complainant for the full purchase price of the bananas, or \$4,320.00. Respondent's failure to pay complainant this amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest. Respondent's counterclaim, since it arose out of the same cause of action as allowed in the complaint, should be dismissed.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, \$4,320.00, with interest thereon at the rate of 13% per annum from April 1, 1984, until paid. Copies of this order shall be served upon the parties.

HARVEST FRESH PRODUCE, INC. v. ALSUM PRODUCE, INC. PACA
Docket No. 2-6791. Decided February 10, 1986.

3. sale with market protection—Failure to prove market decline. Complainant supported contention of complainant that contract for sale of potatoes was at \$14.25 per hundredweight with protection against market decline to be based on F.O.B. Washington State prices. Respondent failed to submit evidence of market decline and complainant awarded reparation based on original contract with less deduction for a shortage of 8 sacks on arrival.

George S. Whitten, Presiding Officer.
Complainant, pro se.
Respondent, pro se.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$556.00 in connection with the shipment in interstate commerce of one truckload of potatoes.

A copy of the Report of Investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed \$15,000, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, and respondent filed an answering statement. Complainant did not file a statement in reply. Neither party filed a brief.

sin, the potatoes described in Finding of Fact 3 above, except that the truck was short 8 sacks of potatoes. Respondent accepted the potatoes on arrival.

5. Complainant invoiced respondent on the basis of 450 sacks of potatoes at \$14.25 per hundredweight, or \$6,412.50. Respondent paid complainant for 442 sacks of potatoes on the basis of \$1.00 per sack adjustment for market decline, or \$5,856.50.

6. The formal complaint was filed on January 17, 1985, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

The parties to this proceeding agree that their communication with each other was only through the broker, H.L. Newland of Pacific Sun Marketing. Complainant alleges that the sale of the potatoes was f.o.b. with no provision for adjustment due to market decline. Respondent asserts that the sale was on a delivered basis at a price of \$18.00 per hundredweight with a provision for market protection to be measured against potatoes which respondent was purchasing out of Alabama. The broker states that the sale of the potatoes was for \$14.25 per hundredweight, f.o.b., with market protection through July 17, 1984, but that the market protection was to be based on f.o.b. prices of potatoes originating in Washington state.

We have carefully assessed the evidence presented by both parties to this proceeding and find that although there was a provision for market protection, such protection was to be based on f.o.b. shipping point prices, and not on the prices of potatoes originating in the state of Alabama. It should be noted that even had we found in respondent's favor in regard to the question of where the market protection was to be measured, respondent failed to submit evidence demonstrating any decline in price of potatoes originating in Alabama. Respondent also did not demonstrate a decline in market price of potatoes originating in Washington state.

Respondent is liable to complainant on the basis of the invoice price of \$14.25 per hundredweight for the 442 sacks of potatoes received, or a total of \$6,298.50, less the \$5,856.50 which it has already paid complainant, or a net amount of \$442.00. Respondent's failure to pay complainant such amount is a violation of Section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, \$442.00, with interest thereon at the rate of 13% per annum from August 1, 1984, until paid.

Copies of this order shall be served upon the parties.

VALE MAYES & COMPANY, INC., v. KALECK DISTRIBUTING COMPANY.
PACA Docket No. 2-6810. Decided February 10, 1986.

Testimony evidence of the condition of perishable commodities discounted.

Complainant sold respondent two loads of cantaloupes, which graded U.S. #1 prior to shipment. Respondent claimed the produce arrived in poor condition, but presented no fed. inspection of the produce involved. Respondent ordered to pay reparation.

Albaa R. Kahan, Presiding Officer.

B.R. Stewart, Edinburg, Texas, for complainant.

E.G. Hall, McAllen, Texas, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely informal complaint was filed on July 27, 1984 and a formal complaint was filed on November 15, 1984. Complainant seeks to recover \$4,935.35, which amount is alleged to be the outstanding balance for two loads of cantaloupes sold to, respondent and shipped in interstate commerce during the period June 7 through June 12, 1984.

statement, and to which complainant filed a statement in reply. Neither party filed briefs.

FINDINGS OF FACT

1. Complainant, Vale Mayes & Company, Inc., is a corporation whose address is P.O. Box 966, Edinburg, Texas 78540. At the time of the transactions involved herein complainant was licensed under the Act.

2. Respondent, Louis Kaleck, is an individual doing business as Kaleck Distributing Company, whose business mailing address is P.O. Box 1432, McAllen, Texas 78501. At the time of the transactions involved herein, respondent was licensed under the Act.

3. On June 7, 1984, complainant sold to respondent for delivery to his customer in interstate commerce 1,095 cartons of cantaloupes, made up of 168 cartons of #12's at \$7.00 per carton f.o.b.; 504 cartons of #16's at \$7.00 per carton f.o.b.; and 423 cartons of #23's at \$5.50 per carton f.o.b. One ryan recording instrument cost \$22.50. Thus, the total cost of the shipment was \$7,053.00.

4. Prior to the produce being shipped, it was federally inspected and found to grade U.S. No. 1 and have "good internal quality".

5. The produce described in paragraph 3 was shipped June 7, 1984, and arrived in Pittsburgh, Pennsylvania on June 11, 1984, where it was received and accepted by Gullo Produce, Inc.

6. On June 13, 1984, complainant sold to respondent for delivery to his customer in interstate commerce 1,119 cartons of cantaloupe, made up of 199 cartons of #9's at \$6.50 per carton f.o.b.; 130 cartons of #12's at \$7.50 per carton f.o.b.; 112 cartons of #15's at \$8.00 per carton f.o.b.; 616 cartons of #18's at \$7.50 per carton f.o.b.; and 112 cartons of #23's at \$5.50 per carton. One ryan recording instrument cost \$22.50. Thus, the total cost of the shipment was \$8,098.00.

7. Prior to the produce described in paragraph 6 being shipped, it was federally inspected and found to grade U.S. No. 1 and have "good internal quality".

8. The produce described in paragraph 5 was shipped June 13, 1984, and arrived in Pittsburgh, Pennsylvania on June 17, 1984, where it was received and accepted by Gullo Produce, Inc.

9. Although the total invoiced price of the two shipments was \$15,142.00, respondent paid complainant a total of \$10,215.65.

10. The complaint was filed on November 15, 1984, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

Respondent's defense to complainant's action herein is the allegation that complainant breached the contract of sale by supplying cantaloupe which arrived in a deteriorated condition. In other words, respondent alleges a breach of contract based upon the alleged violation of the warranty of suitable shipping condition applicable in f.o.b. sales. There is one problem which precludes us from finding such a breach of contract on the part of complainant. Complainant has introduced credible evidence that both shipments of cantaloupes met the grade U.S. No. 1 prior to shipment. The evidence indicates that the June 7, 1984 purchase arrived in Pittsburgh on either June 10 or 11th, and the purchase of June 13th arrived in Pittsburgh on June 17th. Respondent, in its answering statement, submitted one abridged report of federal inspection which respondent contends shows the product to be in poor condition. The inspection report, B99276, is dated June 15, either four or five days after the arrival and acceptance of the first load, and two days before the arrival of the second load. Since it is obvious that the proffered inspection report cannot relate to the second load, we must determine whether it constitutes an inspection of the first load which arrived on either June 10th or 11th.

Three statements within the proffered document make us conclude that the inspection report dated June 15th does not relate to either of the transactions at issue here. The first statement concerns the total number of cartons contained on the truck. Complainant's evidence shows 1,095 cartons were shipped on June 7th. The June 15th inspection report indicates 1,064 cartons, a difference of 31 cartons. Nowhere in respondent's evidence or pleadings is this discrepancy explained. In addition, the evidence shows that the June 7th shipment contained only size 12's, 18's, and 23's cantaloupes, yet the inspection report of June 15th indicates that the truck which was inspected contained cantaloupes in sizes 9's and 16's in addition to the sizes shipped. Even if we were to disregard this significant inconsistency, the final, conclusive discrepancy is the number of cartons of each size. The inspection report of June 15th indicates 392 cartons of #9's and #12's and 672 cartons of #15-18 and 23's. There is no way to match this with the 168 cartons of #12's, the 504 cartons of #18's, and the 423 cartons of #23's shipped to respondent by complainant on June 7, 1984. The only conclusion we can come to after our examination of the proffered inspection report of June 15th is that the report apparently does not relate to either of the two shipments at issue here.

Respondent's only remaining evidence relating to the cantaloupe's condition is its testimonial evidence.

We have often discounted testimonial evidence concerning the condition of perishable commodities, and asserted the necessity of obtaining a neutral inspection showing the exact extent of damage. See *Mutual Vegetable Sales v. Select Distributors*, 38 A.D. 1359 (1979), and cases there cited. The problem with such evidence is that it is self-serving, and is almost never based on adequate and randomly selected samples as well as the failure to state the exact percentage of damage based on precisely defined criteria. For us to accept this type of testimony it would be necessary that it first be proved by substantial evidence that no federal or private inspection was available and secondly, that the commodity was inspected by several neutral parties who took a significant number of samples, randomly selected, from the entire lot of produce, and examined each fruit in each sample and accurately recorded the exact percentage of damaged fruit from each sample, with what was considered as "damage" being precisely defined. *Produce Specialists of Arizona, Inc. v. Gulfport Tomatoes, Inc.*, 42 A.D. 1194 (1979).

Respondent accepted the subject cantaloupes, and has failed to prove a breach on the part of complainant. Respondent is, therefore, liable to complainant for the full purchase price of the cantaloupes, or \$15,142.00 less the \$10,215.65 which respondent already paid to complainant on July 16, 1984, or a net amount of \$4,926.35. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation \$4,926.35 with interest thereon at the rate of 13% per annum from July 1, 1984, until paid.

Copies of this order shall be served upon the parties.

ASSOCIATED PRODUCE DISTRIBUTORS v. KURT VAN ENGEL COMMISSION Co. INC. PACA Docket No. 2-6820. Decided February 10, 1985.

Cover—no duty on buyer to give notice to seller of intent to make cover purchase against goods not shipped.

Complainant was forced to have contracted to sell two truck loads of broccoli to respondent at a price. After shipping one load complainant advised the broker that it would probably be unable to ship the second load, and was orally informed by the broker that respondent would purchase replacement broccoli if the second load were not shipped. Complainant shipped only a partial second load and after receipt of

same respondent made cover purchase without first advising complainant of its intent to do so. It was held that there is no duty on a buyer to give notice of intent to cover against goods not shipped.

George S. Whitten, Presiding Officer.

Thomas R. Oliveri, for complainant.

Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$2,512.00 in connection with the shipment in interstate commerce of a truckload of broccoli.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed \$15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement. Respondent did not file an answering statement. Complainant filed a brief.

FINDINGS OF FACT

1. Complainant is a partnership composed of Bennett W. Brown, Reno D. Costella, Lael C. Lee, and Halbert Moller, doing business as Associated Produce Distributors, whose address is P.O. Box 1155, Castroville, California.

2. Respondent, Kurt Van Engel Commission Co., Inc., is a corporation whose address is 115 South Second Street, Milwaukee, Wisconsin. At the time of the transactions involved herein respondent

carton for palletization, and \$65.00 for top ice, or a total price for the truckload of \$7,245.80. The terms of sale were stated to be "FOB. A second load to be shipped Thursday at same price."

4. On or about September 26, 1984, complainant advised the broker that it had light supplies of broccoli for the week, and it was questionable whether complainant could make the second load as contracted. The broker advised complainant that both loads were committed at \$6.80, and that if the second load was not shipped respondent would have to buy a replacement load, and complainant would be responsible for any additional cost over the agreed \$6.80 price.

5. On or about September 28, 1984, complainant shipped to respondent a partial truckload of broccoli consisting of 288 cartons of size 14, Green Glen label at \$6.00 per carton, plus \$.65 per carton for cooling, \$.15 per carton for palletization, and \$19.50 for top ice, or a total price of \$1,977.90.

6. Respondent accepted the first load of broccoli and the second partial load of broccoli, and made cover purchases to supply the 772 cartons of broccoli not shipped by complainant. Respondent purchased 196 cartons of size 14 broccoli on September 29, 1984, from California Artichoke and Vegetable Growers Corporation of Castrolville, California at a f.o.b. price of \$10.80 per carton including cooling and palletization, or a total price of \$2,116.80. Respondent purchased an additional 576 cartons of size 14 broccoli from Tom Bengard Ranch, Inc., of Salinas, California on September 29, 1984, at \$9.80 per carton, or a total price of \$5,644.80. The total cover price for the 772 cartons of broccoli was \$7,761.60. Respondent paid complainant in full for the 288 cartons of broccoli shipped on September 28, 1984, and after deducting its cover cost of \$2,512.00, respondent paid complainant \$4,733.00 of the original \$7,245.80 invoice price on the first load of broccoli.

7. The formal complaint was filed on March 11, 1985, which was within nine months after the cause of action alleged herein accrued.

CONCLUSIONS

Complainant asserts that the terms of its contract of sale in regard to the first shipment of broccoli only required that it ship a second load of broccoli at the same price if it had sufficient supplies to do so. However, the memorandum of sale issued promptly by the broker does not state any such qualification in regard to complainant's duty to ship a second load at the same price. We conclude that complainant was obligated to ship an entire load of broccoli at the same price as the first load.

Complainant also asserts that it never received any communication either from the broker or from the respondent, that respondent would make cover purchases due to complainant's failure to ship the entire 1,000 cartons of broccoli on the second load. However the broker clearly states in a letter to this Department, which was included as an exhibit to the Department's report of investigation, that he verbally informed complainant that respondent would buy replacement broccoli if the second load were not shipped at the agreed \$6.80 price.

In addition complainant calls our attention to the fact that a second broker's memorandum of sale was issued as to the shipment of 288 cartons of broccoli from complainant to respondent, and that this confirmation nowhere states that respondent would be buying against the contract of complainant. We do not consider this to be at all significant. Complainant is somehow under the mistaken notion that respondent had a legal duty to give complainant notice prior to making the cover purchases. However, there is no such duty where, as here, there is a failure to ship produce which a shipper is contractually bound to ship. See Uniform Commercial Code §§ 2-711 & 2-712. Complainant knew without being told that it had failed to ship to respondent the broccoli which it had previously obligated itself to ship. Complainant also should have known that respondent had a legal right to make cover purchases as a consequence of complainant's failure.

We find on the basis of all of the evidence that the cover purchases made by respondent were prompt and proper and that the cost of such cover was properly deducted by respondent when it made payment to complainant. The complaint should be dismissed.

ORDER

The complaint is dismissed.

Copies of this order shall be served upon the parties.

UCON PRODUCE, INC. v. BEN VASQUEZ PRODUCE, INC. PACA Docket
No. 2-6957. Decided February 10, 1986.

Acceptance of product, even if not conforming to original order, obligates purchaser for the cost of the product.

Respondent ordered potatoes, through a broker which were shipped by complainant. Respondent accepted potatoes, although claiming the complainant shipped more than ordered. Respondent found liable for cost of entire shipment.

Allan R. Kahau, Presiding Officer.

Ben Harris, Ucon, Idaho, for complainant.

Ben Vasquez, Jr., Houston, Texas, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 999a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in connection with the sale of 421 cartons of Idaho potatoes in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto admitting liability, but claiming that an extension of credit was agreed to by the parties. The amount claimed as damages in the formal complaint does not exceed \$15,000.00, and, therefore, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Under this procedure, the verified pleadings of the parties are a part of the evidence in this case as is the Department's report of investigation. In addition, the parties were given the opportunity to file evidence in the form of verified statements, but neither party did. On December 2, 1985, complainant filed a two sentence brief stating that respondent still owed complainant the entire amount for the potatoes, \$4,455.00.

FINDINGS OF FACT

1. Complainant is a corporation whose address is 195 West Brosoy, Ucon, Idaho 83454. At the time of the transaction involved herein complainant was licensed under the Act.

2. Respondent, Ben Vasquez Produce, Inc., is a corporation whose address is 800 Booth Street, 2548 Airline Drive, Houston, Texas 77009. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On or about November 29, 1984, complainant sold to respondent 225 50 pound cartons of U.S. No. 1-70 count Idaho potatoes at \$21.00 per carton, 100 50 pound cartons of U.S. No. 1-80 count Idaho potatoes at \$21.00 per carton, 75 50 pound cartons of U.S. No. 1-90 count Idaho potatoes at \$19.00 per carton; and 22 100 pound burlap sacks of U.S. No. 1 Idaho (bakers) potatoes at \$15.00 per sack. The terms of the sale were "f.o.b. prices".

4. The sale was negotiated by C. H. Robinson Company, a broker located in Houston, Texas.

5. On or about November 29, 1984, beginning at 8:00 a.m. and concluding on November 30, 1984 at 3:00 p.m., the potatoes which were the subject of the contract between complainant and respondent were federally inspected at complainant's place of business in Ucon, Idaho, with the potatoes grading U.S. No. 1 and meeting the size as marked.

6. On November 30, 1984, complainant shipped the said potatoes to respondent in Houston, Texas. Upon arrival, respondent accepted said potatoes.

7. Respondent has made no payment to complainant in connection with the potatoes which were invoiced at \$4,455.00.

8. The complaint was filed on May 30, 1985, which was within nine months from the date the cause of action arose.

CONCLUSIONS

Respondent has failed to pay complainant \$4,455.00, the entire amount of the contract price of the potatoes. Respondent received and accepted the potatoes, and is thus liable for the contract price less damages due to any breach of warranty by complainant. Respondent made no allegation regarding the quality of the potatoes, and is thus liable for the contract price, absent other valid defenses.

Respondent did allege that it had originally ordered fewer potatoes than were shipped and accepted. Under section 2-601 of the Uniform Commercial Code, respondent had the right, upon improper delivery of the extra "unordered" potatoes to accept the units it had ordered and reject the rest. U.C.C. § 2-601(c) (1978). Had respondent rejected the excess potatoes, it would have had no further obligation for those "extra" potatoes. U.C.C. § 2-602(2) (1978). By not properly rejecting the potatoes, respondent accepted them, and thus became liable for their cost. U.C.C. § 2-606 (1978).

Respondent also alleges that as a result of the delivery of the extra potatoes, the parties agreed to an unspecified extension of credit. Such claim by respondent is not, in the least, credible. Since respondent failed to pay for the amount of potatoes it did order promptly—nor had it made any effort to make even partial payment to complainant by the time it filed its answer nine months later, respondent's claims are of no value.

Respondent is, therefore, liable to complainant for the contract price of \$4,455.00. Its failure to pay such sum is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, \$4,455.00, with interest thereon at the rate of 13% per annum from January 1, 1985, until paid.

Copies of this order shall be served upon the parties.

WELL-PICT, INC., v. SAM WANG FOOD CORP., INC. PACA Docket No. 2-6737. Decided February 14, 1986.

Acceptance-partial unloading—Inspection-timely—Notice of breach-timely—F.O.B.-suitable shipping warranty—Damages-need not be calculable with mathematical accuracy—Damages-deviation from normal method of computation allowed.

In a F.O.B. sale of strawberries respondent was found to have accepted by unloading. Complainant's breach of warranty of suitable shipping condition was demonstrated by a Federal inspection made 80 hours after arrival showing an average of 35% soft and leaking berries and an average of 14% Gray Mold Rot. Notice of the breach given 2 to 3 days after arrival was found to be timely. Respondent dumped approximately one half of the berries and paid for the remainder at the contract rate plus Tectrol and cooling expenses for the entire load. This was found to be an adequate approximation of respondent's damages. Respondent's counterclaim arising out of the same transaction was denied because respondent failed to establish its contention that the berries were sold as U.S. No. 1, and because respondent failed to account in the normal manner by showing the gross proceeds of the resale of the berries less expenses of the resale.

George S. Whitten, Presiding Officer.

Thomas P. Oliveri, Newport Beach, Calif., for complainant.

Joseph A. Ceroni, Jr., Vienna, VA., for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a et seq.). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$1,930.00 in connection with the shipment in interstate commerce of one truckload of strawberries.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant and asserting a counterclaim arising out of

the same transaction in the amount of \$953.99. Complainant filed a reply to the counterclaim denying any liability thereunder.

The amount claimed in the formal complaint or counterclaim does not exceed \$15,000, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, and respondent filed an answering statement. Complainant also filed a statement in reply and a brief.

FINDINGS OF FACT

1. Complainant, Well-Pict, Inc., is a corporation whose address is P.O. Box 973, Watsonville, California. At the time of the transaction involved herein complainant was licensed under the Act.

2. Respondent, Sam Wang Food Corp., Inc., is a corporation whose address is 1258 5th Street N.E., Washington, D. C. At the time of the transaction involved herein respondent was licensed under the Act.

3. On or about May 30, 1984, complainant sold to respondent 768 flats of strawberries at \$5.00 per flat, plus \$.60 per flat for cooling, \$148.00 for Tectrol and \$11.15 for a Ryan temperature recorder, for a total price for the lot of \$4,460.05.

4. Complainant shipped the trucklot of strawberries from loading point in California on May 30, 1984, at 9:15 p.m. local time, to respondent in Washington, D. C. The strawberries arrived in Washington, D. C., and were unloaded at approximately 1:00 a.m. on June 5, 1984, into respondent's warehouse. Respondent made notations on the bill of lading indicating that the strawberries were in poor condition.

5. The Ryan temperature tape showed temperatures throughout the trip which ranged generally from 34 to 36 degrees, but included a few short term excursions into the 45 to 48 degree range.

6. On June 6, 1984, at 6:10 a.m., the strawberries were federally inspected at respondent's warehouse. The inspection showed the temperatures to range from 35 to 38 degrees Fahrenheit, and showed the condition to be as follows:

Berries mostly ripe and firm. Mostly dull, some fairly bright. 15 to 75% in most, none in some, average 35% soft and leaking berries. Decay ranges 5 to 40%, in most, none

in some, average 14% Gray Mold Rot, mostly nested some scattered throughout pack.

7. Respondent notified the broker, M & M Brokerage Company of Watsonville, California, on June 6, 1984, that 386 flats of the strawberries were in unsalable condition. The broker notified complainant of the condition of the strawberries on or about June 7, to June 9, 1984.

8. On June 11, 1984, at 9:45 a.m., 386 flats of the strawberries were federally inspected in respondent's warehouse. The inspection showed the temperatures to range from 40 to 42°F and stated the condition to be as follows:

Generally 35 to 75%, in few none, average 44% Soft and leaking berries. Decay ranges 25 to 100% Average 46% Gray Mold Rot in well developed stages.

It was noted on the certificate that respondent stated to the inspector that the lot of strawberries was to be dumped.

9. Respondent dumped 386 flats of the strawberries, and paid complainant at the contract rate for the remaining strawberries, plus cooling, Tetrol, and temperature recorder charges for the entire load, or a total of \$2,530.05.

10. The informal complaint was filed on July 3, 1984, which was within nine months after the cause of action alleged herein accrued.

CONCLUSIONS

Complainant brings this action to recover the balance of the purchase price of the 768 flats of strawberries accepted by respondent. Respondent contends that it rejected 386 flats of the strawberries and only conditionally accepted the remaining strawberries. However, it has been consistently held that even a partial unloading of a shipment of perishable produce is an exercise of sufficient control over the entire load to constitute an acceptance thereof. See *Crown Orchard Co. v. Mid-Valley Produce Corporation*, 34 Agric. Dec. 1381 (1975). Respondent is deemed to have accepted the entire load of strawberries, and consequently became liable to complainant for the full purchase price thereof less any damages shown to have been incurred due to any breach of contract by complainant. The burden of proving both breach and damages rest upon respondent. *The Grower-Shipper Potato v. Southwestern Produce Co.*, 28 Agric. Dec. 511 (1969).

Respondent also contends that the contract between the parties called for the strawberries to grade U.S. No. 1. Although the sale of the strawberries was negotiated through a broker, neither party

submitted a copy of a broker's memorandum of sale. Also the record does not contain any statement from the broker. The only documentation of this sale is complainant's invoice which does not show that the strawberries were sold with any grade designation. Respondent used the bottom of the invoice to render its accounting to complainant, and made no objection thereon to the terms of the sale. Complainant has consistently denied that the strawberries were sold as U.S. No. 1, and accordingly we find that the strawberries were sold without any designation as to grade.

Both parties admit that the strawberries were sold on a f.o.b. basis. Consequently under the applicable regulations (7 CFR § 46.43(i) & (j)) the suitable shipping condition warranty was in effect as to this shipment. Under the terms of the warranty complainant was obligated to ship strawberries which would arrive at contract destination without abnormal deterioration provided transportation services and conditions were normal. The Ryan temperature tape, as well as the pulp temperatures disclosed by the federal inspection of June 6, 1984, indicate that transportation service and conditions were normal. Complainant, however, contends that the federal inspection on June 6, some thirty hours after arrival of the berries, should be discounted as being too late. Certainly we would prefer to see inspections made as soon as possible after the arrival of perishable produce. Nevertheless the inspection of these berries showed that temperatures had been kept within an acceptable range, and consequently the results of the inspection showing an average of 35% soft and leaking berries, plus an average of 14% Gray Mold Rot, are clearly indicative of a failure of the strawberries to make good delivery at time of arrival. See *Rala Singh Farms v. E. Armata, Inc.*, 32 Agric. Dec. 679 (1973.)

Complainant also vigorously maintains that it was not given notice of a breach within a reasonable time. The requirement for notice of a breach of warranty within a reasonable time is set forth in section 2-607(3)(a) of the Uniform Commercial Code. Its purpose, as stated in a comment to that section, is to prevent commercial bad faith. See *Spudco v. Yick Lung Co.*, 36 Agric. Dec. 715 (1977). Complainant maintains in its brief and in its statement in reply, that it was not notified of any condition problems in the strawberries either directly through the broker until "some ten days after shipment." However, complainant's representative in filing the informal complaint in this proceeding stated that "according to Well-Pict's salesman, Mr. Dan Murphy, his notes reflect that approximately eight to ten days after shipment, his office was notified of apparent arrival problems with the strawberries. Eight days after shipment would be on June 7, 1983. Consequently, by complain-

ant's own admission it may have been notified of the breach as early as one day following the federal inspection of the strawberries, or two to three days after arrival. We do not feel that this time length, under the circumstances of this case, is excessive or unreasonable. See *Eli Smith v. Hy Fisher*, 16 Agric. Dec. 1008 (1957). In summary, we find that respondent has adequately shown that complainant breached the contract of sale by shipping strawberries which were not in suitable shipping condition at time of shipment, and that respondent gave adequate and timely notice of the breach to complainant.

Since respondent accepted the trucklot of strawberries it became liable to complainant for the full contract price thereof less damages resulting from complainant's breach. The measure of damages is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted. See UCC § 2-714. Respondent segregated out of the total 768 flats of strawberries, 382 flats which it deemed to be salable. Respondent paid complainant the full contract price for these berries. The remaining 386 flats of berries were stated by respondent, when it gave notice to the broker of complainant's breach, to be unsalable. Respondent on June 11, 1984, secured a federal inspection of these berries which showed an average of 44% soft and leaking berries and an average of 46% Gray Mold Rot in well developed stages. Respondent submitted this inspection certificate as a dump certificate, and it clearly qualifies as such. We conclude that the 386 flats of strawberries had no commercial value.

The proper method for respondent to have shown the value of the strawberries which it accepted would have been to have submitted the results of the resale of the berries not dumped. Instead of doing this respondent paid for these berries at the contract rate. In view of the overall poor condition of the berries as shown by the federal inspection on June 6, we will accept respondent's method of showing damages in this proceeding. The Uniform Commercial Code, Section 1-106, states in relevant part that "The remedies provided by this Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed . . ." The comments to this section state that one purpose thereof was "to reject any doctrine that damages must be calculable with mathematical accuracy." As stated earlier in this proceeding respondent not only paid for the berries not dumped at the contract price, but also paid complainant for the Tectrol and cooling expenses for the total shipment of berries. Respondent only deducted from the invoice the contract price of \$5.00

per flat for the 386 flats of strawberries dumped, or \$1,330.00. We will accept this amount as respondent's damages.

Respondent's counterclaim requested \$1.50 per flat for all of the berries on the grounds that they failed to meet the alleged contract requirements of grading U.S. No. 1. We have already disposed of this contention by our finding that the contract did not call for the strawberries to grade U.S. No. 1. The remainder of respondent's counterclaim is an effort to recoup the cooling, Tectrol and USDA inspection costs relative to the shipment of strawberries. However, in view of respondent's failure to account in the normal manner by showing the gross proceeds of the resale of the berries less expenses of the resale, we cannot award respondent this amount. The counterclaim should be dismissed.

ORDER

The complaint is dismissed.

The counterclaim is dismissed.

Copies of this order shall be served upon the parties.

ACTION PRODUCE *v.* CORGAN & SON, INC. PACA Docket No. 2-6801.
Decided February 14, 1986.

Burden of proof as to breach and damages-upon respondent—Answer not verified—no evidentiary value—Breach of warranty and damages-not proven.

Respondent held liable for the contract prices of 9 of the 15 lots of lettuce it received and accepted without objection. Respondent failed to sustain its burden of proving a breach of warranty and damages with regard to the 6 remaining lots, as its answer and supporting documents were not in evidence because the answer was unverified, and the documents did not support respondent's position.

Andrew Stanton, Presiding Officer.

Thomas Oliveri, Newport Beach, Calif., for complainant.

Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended 7 U.S.C. § 499a *et seq.*. A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$85,939.04 in connection with the sale of 15 truckloads of lettuce in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability.

Although the amount claimed as damages is in excess of \$15,000.00, the parties waived oral hearing. Therefore, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered to be part of the evidence, as is the verified complaint. The answer, since it is unverified, is not considered a part of the evidence. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs. Complainant submitted an opening statement, but respondent elected not to submit any additional evidence. Complainant also filed a brief.

FINDINGS OF FACT

1. Complainant, Action Produce, is a partnership whose address is P.O. Box 1712, Glendale, Arizona.

2. Respondent, Corgan & Son Inc., is a corporation whose address is 161-162 N.Y.C. Terminal Market, Bronx, New York. At the times of the transactions involved herein, respondent was licensed under the Act.

3. In August and September 1984, complainant sold to respondent 15 truckloads of lettuce, as follows:

Com- plainant's Invoice No.	Date Shipped	Con- tract Price
		\$1,100.90
1302	8/2/84	8,289.50
1304	8/13/84	5,763.30
1305	8/17/84	6,094.50
1306	8/18/84	4,677.50
1417	8/20/84	4,412.90
1422	8/31/84	4,677.50
1428	9/4/84	4,412.90
1445	9/5/84	4,422.50
1470	9/6/84	6,325.70
1487	9/7/84	7,096.90
1502	9/12/84	7,327.30
1525	9/13/84	6,094.50
1550	9/18/84	2,124.34
1576	9/19/84	6,291.90
1607	9/21/84	\$85,889.84
Total		

4. Complainant shipped the 15 trucklots of lettuce to respondent, which accepted them but has failed to make any payment therefor.
5. A formal complaint was filed on January 10, 1985, which was within nine months from when the causes of action herein accrued.

CONCLUSIONS

Respondent does not deny receiving and accepting the 15 lots of lettuce, and therefore is liable for the full contract price, less damages due to any breach of warranty on the part of complainant. Respondent bears the burden of proving the breach and damages by a preponderance of the evidence. *Rogelio C. Sardina d/b/a Sardinas Farms v. Caamano Bros., Inc.*, 42 Agric. Dec. 1275 (1983).

In its unsworn answer, respondent offers no defense to nine of the 15 trucklots which complainant alleges it received and accepted, but claims that six of the trucklots were in poor condition, and has enclosed along with its answer six inspection reports purportedly evidencing this poor condition. However, neither the answer nor the inspection reports can be given any consideration as evidence, since the answer was not verified. *H. & M. Fujishige v. Mike Phillips Enterprises, Incorporated*, 30 Agric. Dec. 1095 (1971).

Even if we were to give evidentiary value to these documents, they would not be sufficient to sustain respondent's burden of proof. The inspection report alleged to apply to complainant's invoice number 1333 covers only 350 cartons out of the 832 cartons shipped, and therefore, its findings of 10% damage by discoloration and 7% decay in the head leaves are not representative of the condition of the entire load. Similarly, the inspection applicable to complainant's invoice number 1356 was taken on only 120 of the 880 cartons shipped, and the inspection pertaining to complainant's invoice number 1560 was taken on 300 cartons of the 880 cartons shipped. Neither of these inspections are representative of the condition of the lettuce when it arrived at respondent's place of business. The inspection of complainant's invoice number 1576 shows 93% decay, but it was taken on October 3, 1984, which was 12 days after the lettuce was shipped on September 21, 1984. That inspection cannot, therefore, be given any weight. The inspections pertaining to complainant's invoice numbers 1522 and 1525 appear to show that the lettuce was in unsuitable shipping condition, in breach of warranty (7 CFR 46.46(j)). However, even if complainant did commit a breach of warranty with respect to these two loads, the burden is still upon respondent to show the difference between the value of the lettuce if it had been as warranted, and its actual value. The actual value of the lettuce for invoice numbers 1522 and 1525 cannot be determined because respondent has not submitted

any evidence of resale. *Salinas Marketing Cooperative v. Ed A. Keil Produce, Inc.*, 42 Agric. Dec. 1237 (1933). Therefore, it is clear that with respect to the six loads of lettuce which respondent asserts were abnormally deteriorated, respondent has failed to sustain its burden of proving a breach of warranty and damages resulting from the breach.

Respondent has offered no defense to liability for nine of the trucklots of lettuce which it admittedly accepted, and we have found that respondent has failed to sustain its burden of proving a breach and damages with respect to the six lots of lettuce it contends were abnormally deteriorated. Therefore, respondent is liable for the entire contract price for the 15 trucklots of \$85,939.04, and its failure to pay this sum to complainant is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$85,939.04, with interest thereon at the rate of 13% per annum from October 1, 1984, until paid.

Copies of this order shall be served upon the parties.

UNITED DISTRIBUTORS, INC. v. FIERRO ENTERPRISES. PACA Docket
No. 2-6808. Decided February 14, 1986.

Interstate Commerce—Substantial Evidence—Damages.

Where complainant fails to prove peaches were moved in interstate commerce or sold in contemplation of such movement, complainant is dismissed.

Edward M. Silverstein, Presiding Officer.

Complainant, pro se.

Respondent, pro se.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a et seq.). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$6,075.15 in connection with the shipment of a truckload of peaches.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was

served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed \$15,000, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. The respondent filed a verified answering statement, and the complainant filed a verified statement in reply. Also, complainant filed a brief.

FINDINGS OF FACT

1. Complainant, United Distributors, Inc., is a corporation whose mailing address is 746 South Central Avenue, Los Angeles, California 90021.

2. Respondent, Mike Fierro, is an individual doing business as Fierro Enterprises whose mailing address is 1847 Michigan Avenue, Fresno, California 93705. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On or about July 21, 1983, respondent purchased 1203 cartons of peaches from the complainant at an agreed f.o.b. price of \$4.45 per carton for a total agreed f.o.b. price of \$5,353.35. The truckload of peaches was shipped to the complainant in care of Valley Fruit & Produce, San Julien Street, Los Angeles, California. Upon arrival, on July 22, 1983, the truckload of peaches was the subject of a federal inspection. The inspection certificate issued subsequent thereto (Certificate No. F 070781) indicates that the condition of the peaches was as follows "Firm and ground color turning yellow. All cartons generally show $\frac{1}{2}$ to entire surface damage by brown to black discoloration. No decay."

4. On August 15, 1983, subsequent to an inspection by the Los Angeles County Agricultural Commissioner which showed that the peaches had 90% mold and decay, Valley Fruit & Produce dumped the 1,203 cartons of peaches.

5. On October 3, 1983, the complainant issued a check to respondent in payment for multiple loads of produce in the amount of \$17,159.40. Complainant claims that within that total was payment of \$5,353.35 to respondent with regard to the subject shipment of peaches. On or about November 11, 1983, complainant requested reimbursement for this payment. Respondent refused to do so.

6. On or about November 22, 1983, the complainant billed the respondent for the subject shipment, as follows: 1203 cartons of

peaches at \$4.60 per carton (\$5,533.80), and 45 cents per carton freight (\$541.35), for a total billing of \$6,075.15.

7. The informal complaint was filed on July 3, 1984, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

The dispositive issued in this case is whether or not the peaches were shipped in interstate commerce, or even in contemplation thereof. It is only such produce as is shipped in interstate commerce, or in contemplation thereof, over which we have jurisdiction in this forum. See *Dave Mendrin & Son v. Nick Dells Co.*, 28 Agric. Dec. 1555 (1969). The complainant, in its complaint, pleaded that the peaches involved here were shipped in "interstate commerce." After the Presiding Officer gave the complainant notice to show cause why the complaint should not be dismissed for want of jurisdiction due to its failure to allege either that the peaches were shipped in interstate commerce or that the shipment was made in contemplation of interstate commerce, the complainant replied it had intended to ship the peaches to Hawaii. In view of this, the Presiding Officer permitted the case to proceed to judgment. The respondent, however, in its answering statement, denied that these peaches were sold in contemplation of interstate commerce, and indicated that these peaches were not purchased in a condition which would have allowed them to be shipped to Hawaii. The complainant did not respond to these allegations. We must hold, therefore, that the complainant failed to carry its burden of proving that the subject shipment was made in contemplation of interstate commerce, and we must hold that we have no jurisdiction over the matter. *P. C. Kellam v. Virginia Tomato Corp.*, 29 Agric. Dec. 835 (1970). Therefore, the complaint must be dismissed.

In any event even had we jurisdiction over this matter, we would have to hold that the complainant failed to prove, by substantial evidence, all of the material aspects of its allegations. For example, in order satisfy its burden of proof, the complainant would have to have shown that the respondent breached their contract by shipping goods which were not in conformance with their contractual agreement, and that it was damaged thereby. However, the complainant has failed to provide any evidence that the peaches were not in compliance with the parties' agreement when they were received. The inspection on July 22, 1983, did show a significant amount of discoloration, but there is evidence that the peaches were sold at below market prices because of their maturity and that they were not suitable, when sold, for shipping beyond local markets. In view of this evidence, which was not satisfactorily dis-

puted by complainant, there is insufficient evidence for us to have concluded that there was a breach of contract by the respondent. Moreover, the complainant has failed to prove any damages whatsoever because, apparently, the peaches in the subject shipment sat at Valley Distributors from their July 22, 1983, arrival until they were dumped in August 15, 1983. There is no allegation nor any proof that the peaches were totally unsaleable when received. Nor is there any evidence that the complainant attempted to sell the peaches prior to their being dumped. Complainant's failure to show either that the peaches were unmerchantable upon receipt, or the value of the peaches received through a prompt and proper resale, renders its ability to prove damages impossible since it cannot show the value of the peaches as received. We would therefore have to have concluded that the complainant failed to establish any damages caused by the alleged breach committed by the respondent. *Ralph Samsel Co. v. L. Gillarde Sons Co.*, 19 Agric. Dec. 324 (1960). Under these circumstances too, the complaint would have been dismissed. *New England Grape v. Crane*, 30 Agric. Dec. 902 (1971).

ORDER

The complaint is dismissed.

Copies of this order shall be served upon the parties.

MISCELLANEOUS REPARATION DECISIONS

PIONEER MARKETING COMPANY v. JOHN R. HOFFMAN, JR., PRODUCE
COMPANY. PACA Docket No. 2-6711. Decided January 15, 1986.

Edward M. Silverstein, Presiding Officer.

Complainant, *pro se*.

Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

ORDER ON RECONSIDERATION

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 490a *et seq.*), an order was issued on November 21, 1985, requiring respondent to pay complainant \$2,904.00 plus interest from April 1, 1984, until paid. On December 6, 1985, respondent moved for reconsideration of that decision based on "new evidence."

The "new evidence" submitted by respondent is inadmissible at this time. In order to gain admission of evidence into the instant

record, respondent would have to have filed a petition to reopen. However, petitions to reopen the record in a reparation case can only be entertained prior to the issuance of the final order. 7 CFR 47.24(b). In this case, the final order was issued on November 21, 1985. Thus, even had respondent filed a petition to reopen at this time, it would have to have been denied. Moreover, since respondent did not show that its failure to adduce the evidence in a timely fashion was not the result of its failure to use due diligence the petition, even if filed before the issuance of the November 21, 1985, Decision and Order, would have been denied. See *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971); and *Reconstruction Finance Corp. v. Commercial Union, Etc.*, 123 F. Supp. 48 (S.D. N.Y. 1954).

In any event, the "new evidence" offered by respondent has been reviewed, and it does not aid respondent's cause at all because the "new evidence" does not relate to the 480 cartons of lettuce shipped to it by complainant on February 20, 1985, which are the subject of the complaint filed herein. Further, on reconsideration, respondent appears to be arguing that the broker (Taylor-Byers Co., Inc.) sold it the lettuce. The record, including respondent's admissions in its verified answer, does not support this allegation. Rather, the record reflects that the broker performed its duties as broker, and was not the seller of these cartons of lettuce to respondent.

On the basis of all of the evidence in the record, we find that the November 21, 1985, Decision and Order is amply supported by the evidence and by the law applicable thereto. Accordingly, respondent's petition for reconsideration is dismissed without prior service upon complainant.

The order of November 21, 1985, is reinstated except that the reparation awarded therein shall be paid within 30 days from the date of this order.

Copies of this order shall be served upon the parties.

ARENADA MARKETING, INC., a/t/s RICHARD A. GLASS CO., v. WESTERN PRODUCE COMPANY. PACA Docket No. 2-6945. Order issued January 17, 1986.

Thomas R. Oliveri, Newport Beach, Cal., for complainant.
Tamara J. Wobig, Phoenix, Arizona, for respondent.

Andrew Stanton, Presiding Officer.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$6,048.00 in connection with a transaction involving the shipment of strawberries in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated November 20, 1985, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of November 20, 1985, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

GRANADA MARKETING, INC. *v.* ROCKY PRODUCE, INC. PACA Docket
No. 2-6958. Order issued January 17, 1986.

Thomas R. Oliveri, Newport Beach, Cal., for complainant.
Respondent, *pro se*.

Andrew Stanton, Presiding Officer.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$16,791.25 in connection with a transaction involving the shipment of grapes in interstate commerce.

R&A PRODUCE DIST. CO. INC. v. TOMMY M. BROWN and TIMOTHY X.
COLIN d/b/a SARATOGA DISTRIBUTORS. PACA Docket No. 2-
7000. Order issued January 17, 1986.

Andrew Stanton, Presiding Officer.
Complainant, *pro se*.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$4,740.30 in connection with a transaction involving the shipment of watermelons in interstate commerce.

A copy of the formal complaint was served on respondent. Complainant, in its letter of October 22, 1985, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.
Copies of this order shall be served upon the parties.

FRESH PAK, INC. v. DEKLE BROKERAGE CO., INC. PACA Docket No. 2-
6455. Decided February 4, 1986.

4. Stanton, Presiding Officer.
Complainant, *pro se*.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

RULING ON RECONSIDERATION

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), in which a Decision and Order was issued by the Judicial Officer on July 12, 1985, awarding reparation to complainant in the amount of \$5,337.50, plus interest. Respondent filed a timely petition for reconsideration and a Stay Order was issued on September 25, 1985.

Respondent alleges in its petition that it purchased the potatoes at issue from Trademark Produce & Sales, Kennewick, Washington, and that the Decision and Order erred in concluding that respondent purchased the potatoes from complainant, with Trademark acting only as the broker. However, Finding of Fact 3 of the Decision and Order states that Trademark sent a confirmation c

sale to both parties clearly revealing that the sale was made from complainant to respondent, with Trademark as the broker. Respondent admits in paragraph 4 of its petition that it received this confirmation and has never alleged having objected to it. Therefore, respondent's allegation that it purchased the potatoes from Trademark is not supported by the record.

Respondent also contests the conclusion of the Decision and Order that it accepted the potatoes. Respondent alleges that it gave notice of rejection to Trademark at 3:28 p.m. on February 28, 1983, which was 43 minutes after the potatoes were inspected at 2:45 p.m. that same date, and denies that it first notified Trademark of its desire to reject at 8:50 a.m. the next day, as found by the Decision and Order. There is some evidence that notice of rejection was given to the broker at 3:28 p.m., as respondent's telephone bill shows a call made at that time. However, a different time for notification was asserted by the broker who, in a letter to the Department, said that it was not notified until 6:50 a.m. the day after the inspection, or 8:58 a.m. in respondent's time zone. Resolution of this conflicting evidence is not necessary, since, as the Decision and Order concluded, it is clear from the record that at the time of the inspection, respondent accepted the potatoes by unloading them, and any subsequent attempt at rejection would, therefore, have been unreasonable. Respondent argues that unloading was necessary to make the truckload of potatoes accessible for inspection. However, the inspection report does not support respondent, as it states after "Remarks" only that "Inspection made during unloading process." If the unloading had occurred solely to permit the potatoes to be inspected, such would have been clear from the inspection report.

There is no merit to respondent's allegations of error. Therefore, the September 25, 1985, Stay Order is hereby vacated and the July 12, 1985, Decision and Order is hereby reinstated. The amount awarded in the July 12, 1985, Decision and Order, including interest, shall be paid within 30 days from the date of this order.

Copies of this order shall be served upon the parties.

KITAHARA FARMS, INC., s/t/s KITAHARA PACKING CO., v. UNION
FRUIT COMPANY. PACA Docket No. 2-6664. Decided February
4, 1986.

Decision by Donald A. Campbell, Judicial Officer.

DENIAL OF PETITION TO REOPEN

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), an order was issued July 1, 1985, awarding reparation to complainant against respondent in the amount of \$10,324.33. On July 10, 1985, respondent filed a petition for reconsideration. On August 12, 1985, the order of July 1, 1985, was stayed. On November 25, 1985, the respondent's petition was denied and the order of July 1, 1985, was reinstated except that the reparation awarded therein was ordered paid within thirty (30) days from November 25, 1985. On December 17, 1985, the respondent moved to reopen this matter. Under the Rules of Practice, such motions can only be entertained prior to the issuance of a final order. 7 CFR § 47.24. Since the order in this case was issued on July 1, 1985, respondent's motion to reopen must be denied. In any event, the evidence, which consists of documents related to a transaction which took place two months after the transaction at issue, is not relevant or material to the issues in this case.

It is noted that the November 25, 1985, order was not stayed by the filing of the respondent's motion to reopen, and that the respondent is expected to have complied therewith.

Copies of this order shall be served upon the parties.

GLOBAL TRADING, INC., v. LIMPERT BROS. INC. PACA Docket No. 2-
6679. Order issued February 4, 1986.

G. S. Whitten, Presiding Officer.

David B. Ward, Greenville, S.C., for complainant.

Mitchell H. Kiser, Vineland, New Jersey, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Decision and Order was issued on December 11, 1985, awarding reparation to the complainant in the amount of \$8,227.10. By letter received December 26, 1985, respondent has moved that this matter be reconsidered and reopened.

Accordingly, the order of December 11, 1985 is hereby stayed. Complainant may have ten days from receipt of this order to file an answer to the petition to reconsider and reopen.

Copies of this order shall be served upon the parties. A copy of respondent's petition shall be served upon the complainant, along with this order.

GOLD COAST PACKING, INC., v. CORGAN & SON, INC. PACA Docket
No. 2-6715. Order issued February 6, 1986.

Andrew Stanton, Presiding Officer.

Thomas R. Oliveri, Newport Beach, Calif., for complainant.

Leonard Krencoz, Harrison, New York, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$52,268.30 in connection with a transaction involving the shipment of mixed vegetables in interstate commerce.

A copy of the formal complaint was served on respondent, which filed an answer thereto, denying liability.

In a letter dated July 19, 1985, respondent moved to dismiss the complaint, claiming that complainant had filed suit in the Supreme Court of the State of New York, County of Bronx, No. 18654/84, involving the same parties and issues as the reparation complaint. In a letter dated August 5, 1985, complainant was given five days from its receipt of such letter to show cause why the reparation complaint should not be dismissed, pursuant to 7 U.S.C. 499e(b). Complainant was given several extensions to respond to the notice to show cause and eventually was told that its requested extension until January 6, 1986, would be its last. Counsel for complainant, in a letter dated January 6, 1986, indicated that it has been unable to obtain a voluntary dismissal of the court action. We must thus conclude that complainant has made an election of remedies under 7 U.S.C. 499e(b). Respondent's motion to dismiss is, therefore, granted.

Copies of this order shall be served upon the parties.

TANITA FARMS, INC. v. THADDEUS J. SOBIECH d/b/a TED SOBIECH.
PACA Docket No. 2-6866. Order issued February 6, 1986.

George S. Whitten, Presiding Officer.

Thomas R. Oliveri, Newport Beach, Calif., for complainant.

Jeffrey D. Sherwin, Middletown, N.Y., for respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$79,176.00 in connection with a transaction involving the shipment of onions in interstate commerce.

A copy of the formal complaint was served on respondent. By motion filed on December 23, 1985, complainant authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

COLORADO POTATO GROWERS EXCHANGE v. RICHARD C. SHELTON d/b/
& MID-VALLEY BROKERAGE CO. PACA Docket No. 2-6980. Order
issued February 6, 1986.

Complainant, *pro se*.

Scott Toothaker, McAllen, Texas, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$12,150.00 in connection with a transaction involving the shipment of onions in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated December 13, 1985, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of December 13, 1985, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

FURUKAWA SALES CO., INC., v. CANINO PRODUCE CO., INC., and/or
BENCHMARK BROKERAGE, INC. PACA Docket No. 2-7007. Order
issued February 6, 1986.

Thomas R. Oliveri, Newport Beach, Calif., for complainant.
Respondents, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against Canino Produce Co., Inc. (hereinafter, "Canino"), and in the event Canino is found not to be liable, against Benchmark Brokerage, Inc. (hereinafter, "Benchmark"), in the amount of \$1,728.00 in connection with a transaction involving the shipment of strawberries in interstate commerce.

A copy of the formal complaint was served upon each respondent. Neither respondent filed an answer, and a Default Order was issued on September 17, 1985, against Canino in the amount of \$1,728.00. As Canino was found liable for the full amount of the complaint, the complaint against Benchmark was dismissed, in accordance with complainant's allegation of liability. Canino later moved to reopen after default, and such motion was granted as to Canino only. The Default Order's dismissal of Benchmark remained unaffected by the reopening of the complaint against Canino.

In a letter dated December 2, 1985, complainant authorized dismissal of the complaint against Canino, asserting that Benchmark was solely liable. The complaint against Canino is, therefore, dismissed. However, as Benchmark is no longer subject to a reparation order, since the complaint against Benchmark was dismissed in the September 17, 1985, Default Order, no order of reparation can now be issued against Benchmark.

Copies of this order shall be served upon the parties.

DUAL DISTRIBUTORS, INC., v. A. PELLEGRINO & SON, INC., and/or
MELON PRODUCE. PACA Docket No. 2-7008. Order issued Feb-
ruary 6, 1986.

Andrew Stanton, Presiding Officer.

Complainant, pro se.

Joseph E. Obrey, Boston, Mass., for respondent Melon Produce.

Respondent Pellegrino & Son, pro se.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondents, jointly and severally, in the amount of \$10,689.25 in connection with a transaction involving the shipment of mixed vegetables in interstate commerce.

In a letter dated December 6, 1985, the Department informed complainant that respondent Melon Produce had provided evidence that complainant had filed suit in the United States District Court for the District of Massachusetts (No. 85-3019-W) against both respondents, involving the same issues as the reparation complaint. Complainant was given 15 days from its receipt of such letter to provide evidence that the court suit had been dismissed without prejudice, or the reparation complaint would be dismissed, pursuant to 7 U.S.C. §499e(b). Complainant did not file a response. Therefore, the complaint herein is hereby dismissed.

Copies of this order shall be served upon the parties.

MOUNTAIN VIEW PRODUCE v. REX E. SPARKS PRODUCE and/or C.J.'s
BROKERAGE. PACA Docket No. 2-6653. Order issued February
13, 1986.

Peter Train, Presiding Officer.

Harold E. Creamer, Idaho Falls, Idaho, for complainant.

T.C. Bowen, Jr., Taswell, VA., for respondent Sparks Produce.

*Stephen M. McCarron, Silver Spring, MD., for respondent Mark L. Hanes, d/b/a
C.J.'s Brokerage.*

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

On November 4, 1985, the parties filed a release in the above-captioned case giving notice that they had reached a settlement in the

above-captioned case. The settlement provided, *inter alia*, that complainant would promptly notify the Department of Agriculture if his claim was settled once he received the agreed-upon payment. Payment has been received and complainant has authorized dismissal of complaint. Therefore this complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

REPARATION DEFAULT DECISIONS ISSUED BY
DONALD A. CAMPBELL, JUDICIAL OFFICER

VITA-WELLSBROCK-KEARNEY INC. v. A.A.A. PRODUCE INC. PACA
Docket No. RD-86-94. Decided January 2, 1986.

Respondent was ordered to pay complainant, as reparation,
\$1,750.00 plus 13 percent interest per annum from February 1,
1985, until paid.

TEXAS DISTRIBUTING CO. INC. v. CHINO'S PRODUCE INC. PACA
Docket No. RD-86-95. Decided January 2, 1986.

Respondent was ordered to pay complainant, as reparation,
\$31,128.60 plus 13 percent interest per annum from December 1,
1984, until paid.

GERALD E. MANN a/t/s FIESTA PRODUCE v. SUNSHINE JUICE CORP.
PACA Docket No. RD-86-96. Decided January 2, 1986.

Respondent was ordered to pay complainant, as reparation,
\$8,968.00 plus 13 percent interest per annum from January 1, 1985,
until paid.

CORKY FOODS CORP. v. PRN FRUIT AND VEGETABLE BROKERS INC
PACA Docket No. RD-86-97. Decided January 2, 1986.

Respondent was ordered to pay complainant, as reparation,
\$1,300.00 plus 13 percent interest per annum from July 1, 1985,
until paid.

ELMCO v. CENTRAL PRODUCE CORP. and/or NATIONAL PRODUCE DIS-
TRIBUTORS INC. PACA Docket No. RD-86-98. Decided January 2,
1986.

Respondent was ordered to pay complainant, as reparation,
\$18,976.50 plus 13 percent interest per annum from April 1, 1985,
until paid.

SAM WONG & SON INC. v. LYCO FOOD PRODUCTS. PACA Docket No. RD-86-99. Decided January 2, 1986.

Respondent was ordered to pay complainant, as reparation, \$19,128.20 plus 13 percent interest per annum from June 1, 1985, until paid.

TOM LANGE COMPANY INC. v. BEN CONTRERAS PRODUCE. PACA Docket No. RD-86-100. Decided January 2, 1986.

Respondent was ordered to pay complainant, as reparation, \$33,801.90 plus 13 percent interest per annum from June 1, 1985, until paid.

MOUNTAIN LAND APPLE SALES INCORPORATED v. CROWN PRODUCE Co. PACA Docket No. RD-86-101. Decided January 2, 1986.

Respondent was ordered to pay complainant, as reparation, \$4,200.00 plus 13 percent interest per annum from June 1, 1985, until paid.

FOWLER PACKING Co. INC. v. CROWN PRODUCE Co. PACA Docket No. RD-86-102. Decided January 2, 1986.

Respondent was ordered to pay complainant, as reparation, \$1,147.60 plus 13 percent interest per annum from July 1, 1985, until paid.

FOUR STAR TOMATO INC v. CROWN PRODUCE Co. PACA Docket No. RD-86-103. Decided January 2, 1986.

was ordered to pay complainant, as reparation,
13 percent interest per annum from June 1, 1985,

Respondent was ordered to pay complainant, as reparation, \$62,222.80 plus 13 percent interest per annum from June 1, 1985, until paid.

C. H. ROBINSON COMPANY v. WHIZPAC INC. PACA Docket No. RD-86-105. Decided January 2, 1986.

Respondent was ordered to pay complainant, as reparation, \$5,128.80 plus 13 percent interest per annum from February 1, 1985, until paid.

RALPH & CONO COMUNALE PRODUCE CORP. v. TOM PANNO, JR. INC. PACA Docket No. RD-86-106. Decided January 2, 1986.

Respondent was ordered to pay complainant, as reparation, \$910.00 plus 13 percent interest per annum from December 1, 1985, until paid.

C. H. ROBINSON COMPANY v. T & M MARKET SERVICES INC. a/t/a GET FRESH PRODUCE CO. PACA Docket No. RD-86-107. Decided January 2, 1986.

Respondent was ordered to pay complainant, as reparation, \$5,720.85 plus 13 percent interest per annum from June 1, 1985, until paid.

INTERSTATE PACKING CO. v. BARTON'S PRODUCE INC. PACA Docket No. RD-86-108. Decided January 2, 1986.

Respondent was ordered to pay complainant, as reparation, \$1,790.00 plus 13 percent interest per annum from February 1, 1985, until paid.

HUNT OIL COMPANY a/t/a PLANTATION PRODUCE COMPANY v. GEORGE HOWARD d/b/a THE PRODUCE CO. PACA Docket No. RD-86-109. Decided January 2, 1986.

Respondent was ordered to pay complainant, as reparation, \$15,208.60 plus 13 percent interest per annum from July 1, 1985, until paid.

E & S GRAPE GROWERS & SHIPPERS v. SANTA FE-WEST SIDE GRAPE DISTRIBUTORS. PACA Docket No. RD-86-110. Decided January 3, 1986.

Respondent was ordered to pay complainant, as reparation, \$1,500.00 plus 13 percent interest per annum from October 1, 1984, until paid.

C. H. ROBINSON COMPANY v. JAMES N. FAULKNER d/b/a THE JIM FAULKNER CO. PACA Docket No. RD-86-111. Decided January 3, 1986.

Respondent was ordered to pay complainant, as reparation, \$163.05 plus 13 percent interest per annum from August 1, 1984, until paid.

McKENNA BROTHERS LTD. v. J. P. DANIEL PRODUCE INC. PACA Docket No. RD-86-112. Decided January 3, 1986.

Respondent was ordered to pay complainant, as reparation, \$7,922.50 plus 13 percent interest per annum from March 1, 1985, until paid.

Respondent was ordered to pay complainant, as reparation, \$6,599.40 plus 13 percent interest per annum from May 1, 1985, until paid.

MALENA PRODUCE INC. v. CROWN PRODUCE Co. PACA Docket No. RD-86-115. Decided January 3, 1986.

Respondent was ordered to pay complainant, as reparation, \$4,574.37 plus 13 percent interest per annum from May 1, 1985, until paid.

KELLY PRODUCE INC. v. CROWN PRODUCE Co. PACA Docket No. RD-86-116. Decided January 3, 1986.

Respondent was ordered to pay complainant, as reparation, \$149,392.05 plus 13 percent interest per annum from June 1, 1985, until paid.

RIO VISTA LIMITED a/t/a GHUMARRA OF CARLSBAD v. CHINO'S PRODUCE INC. PACA Docket No. RD-86-117. Decided January 3, 1986.

Respondent was ordered to pay complainant, as reparation \$3,092.90 plus 13 percent interest per annum from May 1, 1985 until paid.

MARVIN A. SCHWARZ d/b/a MARVIN SCHWARZ PRODUCE v. THE PRODUCE Co. PACA Docket No. RD-86-118. Decided January 6, 1986.

Respondent was ordered to pay complainant, as reparation, \$5,134.80 plus 13 percent interest per annum from July 1, 1985, until paid.

AUSTIN J. MERKEL Co. INC. v. DAVID FREED d/b/a FREED PRODUCE Co. PACA Docket No. RD-86-119. Decided January 6, 1986.

Respondent was ordered to pay complainant, as reparation, \$639.00 plus 13 percent interest per annum from July 1, 1985, until paid.

MANN PACKING Co. INC. v. WAYNE M. HATANAKA d/b/a W. H. DISTRIBUTING. PACA Docket No. RD-86-120. Decided January 6, 1986.

Respondent was ordered to pay complainant, as reparation, \$1,716.70 plus 13 percent interest per annum from May 1, 1985, until paid.

SIX L'S PACKING COMPANY INC. v. BUSBY PRODUCE. PACA Docket No. RD-86-121. Decided January 6, 1986.

Respondent was ordered to pay complainant, as reparation, \$647.50 plus 13 percent interest per annum from February 1, 1985, until paid.

TOP QUALITY FRUIT & PRODUCE DISTRIBUTORS INC. v. ALPINE BROTHERS INC. PACA Docket No. RD-86-122. Decided January 6, 1986.

Respondent was ordered to pay complainant, as reparation, \$6,100.00 plus 13 percent interest per annum from October 1, 1984, until paid.

LEE BRANDS INC. v. JEFFREY L. BARKER d/b/a JET FRESH DISTRIBUTING. PACA Docket No. RD-86-123. Decided January 6, 1986.

Respondent was ordered to pay complainant, as reparation, \$3,493.50 plus 13 percent interest per annum from October 1, 1984, until paid.

TEXAS DISTRIBUTING Co. INC. v. QUINTERO PRODUCE. PACA Docket No. RD-86-124. Decided January 6, 1986.

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Respondent was ordered to pay complainant, as reparation, \$5,500.00 plus 13 percent interest per annum from December 1, 1984, until paid.

JONES FAMILY FARM, v. SUN ROOT FOODS INC. PACA Docket No. RD-86-125. Decided January 6, 1986.

Respondent was ordered to pay complainant, as reparation, \$7,793.61 plus 13 percent interest per annum from May 1, 1985, until paid.

APPLEWOOD ORCHARDS INC. v. BENCHMARK BROKERAGE INC. and/or FLEMING COMPANIES INC. PACA Docket No. RD-86-72. Decided January 15, 1986.

Respondent was ordered to pay complainant, as reparation, \$1,219.75 plus 13 percent interest per annum from December 1, 1984, until paid.

STEVECO INC. v. ALL SEASONS HARVESTING CORPORATION a/t/a ALL SEASONS PACKING. PACA Docket No. RD-86-126. Decided February 12, 1986.

Respondent was ordered to pay complainant, as reparation, \$6,732.00 plus 13 percent interest per annum from June 1, 1984, until paid.

DONALD F. SCHAUB d/b/a WM. SCHAUB & Co. v. SUPER SPUDS INC. PACA Docket No. RD-86-127. Decided February 12, 1986.

Respondent was ordered to pay complainant, as reparation, \$755.25 plus 13 percent interest per annum from June 1, 1984, until paid.

J & L SHELTON INC. v. QUALITY KING PRODUCE CO. INC. PACA Docket No. RD-86-128. Decided February 12, 1986.

Respondent was ordered to pay complainant, as reparation, \$17,793.50 plus 13 percent interest per annum from July 1, 1985, until paid.

FOUR STAR TOMATO INC. v. REM BROKERAGE CO. INC. PACA Docket No. RD-86-129. Decided February 12, 1986.

Respondent was ordered to pay complainant, as reparation, \$9,862.50 plus 13 percent interest per annum from December 1, 1984, until paid.

AUSTIN J. MERKEL CO. INC. v. CECIL WHITE PRODUCE INC. PACA Docket No. RD-86-130. Decided February 12, 1986.

Respondent was ordered to pay complainant, as reparation, \$1,810.50 plus 13 percent interest per annum from August 1, 1985, until paid.

ANTON-ARGIRES BROS. & CO. INC. v. CECIL WHITE PRODUCE INC. PACA Docket No. RD-86-131. Decided February 14, 1986.

Respondent was ordered to pay complainant, as reparation, \$1,257.00 plus 13 percent interest per annum from August 1, 1985, until paid.

STRUBE CELERY & VEGETABLE CO. v. CECIL WHITE PRODUCE INC. PACA Docket No. RD-86-132. Decided February 18, 1986.

Respondent was ordered to pay complainant, as reparation, \$540.25 plus 13 percent interest per annum from August 1, 1985, until paid.

GARNAND MARKETING INC. v. CECIL WHITE PRODUCE INC. PACA Docket No. RD-86-133. Decided February 18, 1986.

Respondent was ordered to pay complainant, as reparation, \$2,905.64 plus 13 percent interest per annum from August 1, 1985, until paid.

TEXAS DISTRIBUTING CO. INC. v. HOLLY PRODUCE CO. INC. PACA Docket No. RD-86-134. Decided February 18, 1986.

Respondent was ordered to pay complainant, as reparation, \$27,150.15 plus 13 percent interest per annum from August 1, 1984, until paid.

SEQUOIA ENTERPRISES INC. v. ALEXANDER C. GUERRA and VIOLA A. GUERRA. PACA Docket No. RD-86-135. Decided February 18, 1986.

Respondent was ordered to pay complainant, as reparation, \$11,577.25 plus 13 percent interest per annum from July 1, 1985, until paid.

SUNSHINE PRODUCE EXCHANGE INC. v. SUMTER VEGETABLE COOPERATIVE. PACA Docket No. RD-86-136. Decided February 18, 1986.

Respondent was ordered to pay complainant, as reparation, \$1,739.82 plus 13 percent interest per annum from May 1, 1985, until paid.

EXPORTADORA FRUTICOLA AZTATLAN, S.A. DE C.V. v. TRIPLE B PRODUCE DISTRIBUTORS INC. PACA Docket No. RD-86-137. Decided February 18, 1986.

Respondent was ordered to pay complainant, as reparation, \$19,815.90 plus 13 percent interest per annum from August 1, 1984, until paid.

SAN MIGUEL PRODUCE INC. v. PRN FRUIT & VEGETABLE BROKERS INC. PACA Docket No. RD-86-138. Decided February 19, 1986.

Respondent was ordered to pay complainant, as reparation, \$3,432.95 plus 13 percent interest per annum from June 1, 1985, until paid.

WASHBURN POTATO CO. v. FARMER SMITH'S WHOLESALE INC. PACA Docket No. RD-86-139. Decided February 19, 1986.

Respondent was ordered to pay complainant, as reparation, \$3,909.55 plus 13 percent interest per annum from June 1, 1985, until paid.

SUNRICH INCORPORATED v. GUERRA BROS. PRODUCE. PACA Docket No. RD-86-140. Decided February 19, 1986.

Respondent was ordered to pay complainant, as reparation, \$9,998.25 plus 13 percent interest per annum from March 1, 1985, until paid.

TOM LANGE COMPANY INC. v. HOLLY PRODUCE CO. INC. PACA Docket No. RD-86-141. Decided February 19, 1986.

Respondent was ordered to pay complainant, as reparation, \$15,833.60 plus 13 percent interest per annum from March 1, 1985, until paid.

MERRILL FARMS v. ALEXANDER C. GUERRA and VIOLA A. GUERRA. PACA Docket No. RD-86-142. Decided February 19, 1986.

Respondent was ordered to pay complainant, as reparation, \$11,583.65 plus 13 percent interest per annum from September 1, 1985, until paid.

A. L. PRAY & SON POTATO CO. LTD v. CENTRAL PRODUCE and/or NATIONAL PRODUCE DISTRIBUTORS INC. PACA Docket No. RD-86-143. Decided February 19, 1986.

Respondent was ordered to pay complainant, as reparation, \$13,668.75 plus 13 percent interest per annum from May 1, 1985, until paid.

SCOTT FINES Co. INC. v. H & L SALES INC. PACA Docket No. RD-86-144. Decided February 20, 1986.

Respondent was ordered to pay complainant, as reparation, \$2,415.10 plus 13 percent interest per annum from August 1, 1985, until paid.

ADMIRAL PACKING COMPANY v. ALEXANDER C. GUERRA and VIOLA A. GUERRA d/b/a V & A PRODUCE. PACA Docket No. RD-86-145. Decided February 20, 1986.

Respondent was ordered to pay complainant, as reparation, \$3,080.00 plus 13 percent interest per annum from August 1, 1985, until paid.

SIGMA PRODUCE Co. INC. v. OTAY PACKING Co. PACA Docket No. RD-86-146. Decided February 20, 1986.

Respondent was ordered to pay complainant, as reparation \$22,329.60 plus 13 percent interest per annum from April 1, 1985 until paid.

STRUBE-TRIO INC. v. DAVID FREED d/b/a FREED PRODUCE Co. PACA Docket No. RD-86-147. Decided February 20, 1986.

Respondent was ordered to pay complainant, as reparation, \$218.81 plus 13 percent interest per annum from August 1, 1985, until paid.

HUNT OIL COMPANY s/t/a PLANTATION PRODUCE COMPANY v. MORNINGSIDE PRODUCE INC. PACA Docket No. RD-86-148. Decided February 20, 1986.

Respondent was ordered to pay complainant, as reparation, \$2,788.80 plus 13 percent interest per annum from December 1, 1984, until paid.

VICTOR E. REYNOLDS d/b/a RITTER AND COMPANY v. CARTIAN PRODUCE INC. PACA Docket No. RD-86-149. Decided February 20, 1986.

Respondent was ordered to pay complainant, as reparation, \$938.25 plus 13 percent interest per annum from April 1, 1985, until paid.

PROVIGO DISTRIBUTION INC. v. STANLEY & JOE RUSSO. PACA Docket No. RD-86-150. Decided February 21, 1986.

Respondent was ordered to pay complainant, as reparation, \$25,267.36 plus 13 percent interest per annum from November 1, 1984, until paid.

BEEF STAKE TOMATO GROWERS INC. v. MAR-TIM TOMATO CO. INC. PACA Docket No. RD-86-151. Decided February 21, 1986.

Respondent was ordered to pay complainant, as reparation, \$1,221.00 plus 13 percent interest per annum from August 1, 1984, until paid.

DEARDORFF-JACKSON COMPANY v. A. PELLEGRINO & SON INC. PACA Docket No. RD-86-152. Decided February 21, 1986.

Respondent was ordered to pay complainant, as reparation, \$543.77 plus 13 percent interest per annum from May 1, 1985, until paid.

PLAINVILLE PRODUCE INC. v. L. C. INTERNATIONAL COMPANY. PACA Docket No. RD-86-153. Decided February 21, 1986.

Respondent was ordered to pay complainant, as reparation, \$2,306.50 plus 13 percent interest per annum from January 1, 1985, until paid.

RIO VISTA LIMITED a/t/s GIUMARRA OF ESCONDIDO v. INTER-TEX ENTERPRISES INC. PACA Docket No. RD-86-154. Decided February 21, 1986.

Respondent was ordered to pay complainant, as reparation, \$8,610.00 plus 13 percent interest per annum from August 1, 1985, until paid.

A. J. SALES COMPANY v. PRN FRUIT & VEGETABLE BROKERS INC. PACA Docket No. RD-86-155. Decided February 21, 1986.

Respondent was ordered to pay complainant, as reparation, \$34,783.30 plus 13 percent interest per annum from July 1, 1985, until paid.

AMERICAN BANANA CO. INC. v. M & M PRODUCE BROKERAGE. PACA Docket No. RD-86-52. Decided February 26, 1986.

Respondent was ordered to pay complainant, as reparation, \$7,884.90 plus 13 percent interest per annum from August 1, 1984, until paid.

VALLEY BROKERAGE INC. v. CROWN PRODUCE CO. PACA Docket No. RD-86-156. Decided February 26, 1986.

Respondent was ordered to pay complainant, as reparation, \$2,981.00 plus 13 percent interest per annum from May 1, 1985, until paid.

PACIFIC FARM COMPANY v. PRN FRUIT & VEGETABLE BROKERS INC. PACA Docket No. RD-86-157. Decided February 26, 1986.

Respondent was ordered to pay complainant, as reparation, \$41,019.30 plus 13 percent interest per annum from July 1, 1985, until paid.

MAINE FARMERS EXCHANGE *v.* NATIONAL PRODUCE DISTRIBUTORS INC. PACA Docket No. RD-86-158. Decided February 26, 1986.

Respondent was ordered to pay complainant, as reparation, \$63,950.25 plus 13 percent interest per annum from June 1, 1985, until paid.

SUNSPROUTS OF TEXAS INC. *v.* BEN VASQUEZ PRODUCE INC. PACA Docket No. RD-86-159. Decided February 28, 1986.

Respondent was ordered to pay complainant, as reparation, \$19,469.05 plus 13 percent interest per annum from July 1, 1985, until paid.

DEL MONTE FRESH FRUIT COMPANY *v.* CROWN PRODUCE DISTRIBUTORS. PACA Docket No. RD-86-160. Decided February 28, 1986.

Respondent was ordered to pay complainant, as reparation, \$29,673.50 plus 13 percent interest per annum from June 1, 1985, until paid.

PEPPER POTATO FARMS INC. *v.* GILLO'S PRODUCE CO. PACA Docket No. RD-86-161. Decided February 28, 1986.

Respondent was ordered to pay complainant, as reparation, \$3,460.00 plus 13 percent interest per annum from February 1, 1985, until paid.

CENTRAL PRODUCE DISTRIBUTORS INC. *v.* FREE STATE PRODUCE INC. PACA Docket No. RD-86-162. Decided February 28, 1986.

Respondent was ordered to pay complainant, as reparation, \$59,070.00 plus 13 percent interest per annum from March 1, 1985, until paid.

JOHN B. HARDWICKE COMPANY v. FREE STATE PRODUCE INC. PACA
Docket No. RD-86-163. Decided February 28, 1986.

Respondent was ordered to pay complainant, as reparation, \$11,934.50 plus 13 percent interest per annum from June 1, 1985, until paid.

MISCELLANEOUS REPARATION DEFAULT ORDERS ISSUED BY
DONALD A. CAMPBELL, JUDICIAL OFFICER

BUD ANTLE INC. v. SEVEN SEAS TRADING CO., INC., a/t/a VALLEY
VIEW FARMS. PACA Docket No. RD-86-37. Decided January
15, 1986.

DENIAL OF MOTION FOR STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Default Order was issued on November 27, 1985, awarding reparation to the complainant in the amount of \$749.80. By letter received on November 22, 1985, but not processed until after the Default Order was issued, respondent has moved that this matter be stayed to give it an opportunity to secure evidence of its absence of liability to complainant. However, this is not sufficient reason for staying the Default Order. Therefore, respondent's motion for a stay is denied.

Copies of this order shall be served upon the parties.

APPLEWOOD ORCHARDS, INC., v. BENCHMARK BROKERAGE, INC., and/
or FLEMING COMPANIES, INC. PACA Docket No. RD-86-72.
Order issued January 15, 1986.

ORDER DENYING MOTION TO REOPEN AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondents failed to file timely answers. However, prior to the issuance of a

Default Order, respondent Fleming Companies Inc. filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)).

The record has been carefully considered and it is concluded that respondent Fleming Companies Inc. has failed to present a good reason why it failed to file a timely answer. The record contains a return receipt card which shows that the formal complaint was received by Fleming Companies Inc. on September 26, 1985. The return receipt card bears a signature of a person purporting to sign on behalf of Fleming Companies Inc. Fleming Companies Inc. claims in its motion that the complaint was not received by its "Produce Operations" unit. However, such internal distribution problems are not a good reason for the failure of Fleming Companies Inc. to submit a timely answer. Therefore, the motion to reopen after default is hereby denied.

Copies of this order shall be served upon the parties.

STANDARD FRUIT and STEAMSHIP COMPANY v. ASTRO MEAT TRADING, INC. PACA Docket No. RD-85-164. Order issued January 15, 1986.

ORDER DENYING MOTION TO REOPEN AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. A Default Order was issued on March 25, 1985, ordering respondent to pay \$48,689.50, with interest. On November 12, 1985, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer.

Respondent's motion must be denied. The March 25, 1985, Default Order ordered respondent to pay reparation "within 30 days from the date of this order." Therefore, payment was due no later than April 24, 1985. After that date the Default Order is considered to have become final, and the Secretary is without jurisdiction to consider motions such as that made by respondent. See *Lasky v. Commissioner of Internal Revenue*, 235 F.2d 97 (9th Cir. 1956), *aff'd per curiam* 352 U.S. 1027 (1956); *Southland Produce Co., a/k/a Keystone Produce Co. v. Caamano Brothers Wholesale*, 39 Agric. Dec. 789 (1980).

Copies of this order shall be served upon the parties.

CONSUMERS PRODUCE Co., of Pittsburgh v. CENTRAL PRODUCE Co.
INC. PACA Docket No. RD-85-391. Order issued January 17,
1986.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$637.70 in connection with a transaction involving the shipment of produce in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated September 27, 1985, complainant was notified by the Department that respondent had tendered to complainant a check in full settlement of complainant's claim. Complainant was sent such check and informed that an order would be issued dismissing the complaint. Complainant, in a letter dated November 21, 1985, agreed to the proposed dismissal.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

THE CROSSETT COMPANY v. KEVIN J. RE d/b/a J.M.J. PRODUCE.
PACA Docket No. RD-86-46. ORDER issued January 22, 1986.

ORDER VACATING PRIOR ORDER AND ORDER STAYING PROCEEDING

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), a Default Order was issued against respondent on December 3, 1985, requiring him to pay complainant \$4,825.25 with interest thereon from July 1, 1985, until paid. Unknown to the Department however was that respondent had filed a petition in Chapter 7 before the United States Bankruptcy Court for the Southern District of Ohio, Western Division, designated Case No. 1-85-03049, on November 7, 1985. The filing of such a petition automatically stays proceedings such as those involved here. 11 U.S.C. 362(a). The Default Order of December 3, 1985, thus should never have been issued. In view of this, it is now vacated.

It is unknown as to whether the respondent's debts have been discharged by the Bankruptcy Court under 11 U.S.C. 727. Upon receiving notice of such a discharge, we will dismiss the complaint. Until such time as the Department is notified that such a discharge has been ordered, this matter is stayed.

Copies of this order shall be served upon the parties. In addition, copies shall be served on Nicholas J. Pantel, Esq., Assistant United States Attorney, 220 United States Post Office & Courthouse, 100 East Fifth Street, Cincinnati, Ohio 45202, and Robert A. Goering, Esq., Wilke & Goering, 128 E. 6th Street, Cincinnati, Ohio 45202.

JONES FAMILY FARM v. SUN ROOT FOODS, INC. PACA Docket No. RD-86-125. Order issued January 24, 1986.

ORDER CORRECTING PRIOR ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), a Default Order was issued on January 6, 1986, ordering respondent to pay complainant \$7,793.61, plus interest at the rate of 18 percent per annum from May 1, 1985. However, the interest should have been from May 1, 1984. Therefore, the January 6, 1986, Default Order is hereby corrected to require respondent to pay complainant, \$7,793.61, plus interest at the rate of 18 percent per annum from May 1, 1984, until paid.

Copies hereof shall be served upon the parties.

CHICUITA BRANDS, INC., v. AL NAGELBERG & Co. INC. PACA Docket No. RD-86-28. Order issued February 18, 1986.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. However, after the issuance of a Default Order on November 15, 1985, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)). The November 15, 1985, Order was stayed on December 10, 1985, and respondent's motion was served upon complainant which filed an opposition thereto.

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that good reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co. v. United Fruit Distributors*, 16 Agric. Dec. 790 (1957). Accordingly, respondent's default in the filing of an answer is set aside.

Respondent has ten days from service hereof to file an answer. Failure to file an answer in that time will result in reinstatement of the Default Order against it. No extensions of time will be granted. In order to be considered part of the evidence in this proceeding, the answer must be verified.

Copies of this order shall be served upon the parties.

C.H. ROBINSON COMPANY v. WHIZPAC, INC. PACA Docket No. RD-86-105. Order issued February 13, 1986.

STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Default Order was issued on January 2, 1986, awarding reparation to the complainant in the amount of \$5,128.80. By letter received January 9, 1986, respondent has moved that this matter be reopened after default.

Accordingly, the order of January 2, 1986, is hereby stayed. Complainant may have fifteen (15) days from receipt of this order to file an answer to the petition to reopen after default.

Copies of this order shall be served upon the parties. A copy of respondent's petition shall be served upon the complainant.

E&S GRAPE GROWERS & SHIPPERS v. SANTA FE-WEST SIDE GRAPE DISTRIBUTORS. PACA Docket No. RD-86-110. Order issued February 13, 1986.

ORDER DENYING MOTION TO REOPEN AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. A Default Order was issued on January 3, 1986, for \$1,500.00 plus interest. Subsequent to the issuance of a Default Order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(c)).

The record has been carefully considered and it is concluded that the that a good reason has not been shown why the relief requested in the motion should be granted. Respondent claims that it operated only from September 20, 1985 to November 1, 1985, and that it was closed on November 1 and could not receive any mail. Howev-

er, the return receipt card in the file shows that the complaint was received and signed for by respondent on October 30, 1985. Even if respondent was not operating after November 1, 1985, it could have responded to the complaint, as it allegedly was not operating in January 1986 as well, but nonetheless submitted a motion to reopen after default after receiving the January 3, 1986, Default Order. The motion to reopen is, therefore, denied.

Copies of this order shall be served upon the parties.

In re: WILLIAM GRAHAM. P.Q. Docket No. 47. Decided January 9, 1986.

*Robert Broussard, Reg. Div. OGC, for complainant.
John Todeco, Chicago, Illinois, for respondent.*

Decision by Edward McGrail, Administrative Law Judge.

CONSENT DECISION

The above-referenced proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended ("Act"), (7 U.S.C. Section 151 *et seq.*) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondent violated the Act and regulations promulgated thereunder (7 CFR Section 318.13 *et seq.*). The parties have agreed that the above-referenced proceeding should be terminated by entry of this Consent Decision and have agreed to the following stipulations:

1. For the purpose of this Consent Decision only, the respondent admits that the Secretary of the United States Department of Agriculture has jurisdiction in the above-referenced proceeding, but respondent does not admit or deny the remaining allegations in the complaint.

2. The parties stipulate and agree to the issuance of this Consent Decision without further procedures.

3. The parties stipulate and agree to waive any requirements that the final decision in these proceedings contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof; and

4. The parties stipulate and agree to waive all rights to seek judicial review and otherwise challenge or contest the validity of this decision.

5. The respondent waives any action under the Equal Access to Justice Act of 1980 (5 U.S.C. Section 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with the above-referenced proceeding.

FINDINGS OF FACT

1. United Airlines is a corporation doing business at Honolulu International Airport, Honolulu, Hawaii.

2. Respondent William Graham is an employee of United Airlines at Honolulu International Airport.

3. In the course of his employment for United Airlines, respondent William Graham handles baggage moving from Honolulu International Airport to the continental United States.

CONCLUSIONS

The parties having admitted the jurisdictional facts and having agreed to the provisions set forth in the instant order in disposition of the above-referenced proceeding, such order and decision will be issued.

ORDER

1. Respondent William Graham shall pay the sum of one hundred dollars (\$100) in settlement of this matter. Respondent William Graham shall send, payable to the "Treasurer of the United States," a certified check or money order for said amount to Mark Dopp, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day that a signed copy of this order is served upon the respondent.

In re: UNITED AIRLINES. P.Q. Docket No. 49. Decided January 9, 1986.

*Robert Broussard, Reg. Div. OGC., for complainant.
Sylvia Bateman, Honolulu, Hawaii, for respondent.*

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

The above-referenced proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended ("Act"), (7 U.S.C. Section 151 *et seq.*) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondent violated the Act and regulations promulgated thereunder (7 CFR Section 318.13 *et seq.*). The parties have agreed that the above-referenced proceeding should be terminated by entry of this Consent Decision and have agreed to the following stipulations:

1. For the purpose of this Consent Decision only, the respondent admits that the Secretary of the United States Department of Agriculture has jurisdiction in the above-referenced proceeding, but respondent does not admit or deny the remaining allegations in the complaint.

2. The parties stipulate and agree to the issuance of this Consent Decision without further procedures.

3. The parties stipulate and agree to waive any requirements that the final decision in these proceedings contain findings and

conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof; and

4. The parties stipulate and agree to waive all rights to seek judicial review and otherwise challenge or contest the validity of this decision.

5. The respondent waives any action under the Equal Access to Justice Act of 1980 (5 U.S.C. Section 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with the above-referenced proceeding.

FINDINGS OF FACT

1. United Airlines is a corporation doing business at Honolulu International Airport, Honolulu, Hawaii.

2. In the course of doing business, United Airlines handles baggage moving from Honolulu International Airport to the continental United States.

CONCLUSIONS

The parties having admitted the jurisdictional facts and having agreed to the provisions set forth in the instant order in disposition of the above-referenced proceeding, such order and decision will be issued.

ORDER

1. Respondent United Airlines shall pay two thousand two hundred dollars (\$2200) in settlement of this matter. Respondent United Airlines shall send, payable to the "Treasurer of the United States," a certified check or money order for said amount to Mark Dopp, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day that a signed copy of this order is served upon the respondent.

In re: ELIZABETH MANN. P.Q. Docket No. 50. Decided January 9, 1986.

*Robert Brussard, Reg. Div. OGC, for complainant.
John Todesca, Chicago, Illinois, for respondent.*

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

The above-referenced proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended ("Act"), (7 U.S.C. Section 151 *et seq.*) by a complaint filed by the Administrator of the

Animal and Plant Health Inspection Service alleging that the respondent violated the Act and regulations promulgated thereunder (7 C.F.R. Section 318.13 *et seq.*). The parties have agreed that the above-referenced proceeding should be terminated by entry of this Consent Decision and have agreed to the following stipulations:

1. For the purpose of this Consent Decision only, the respondent admits that the Secretary of the United States Department of Agriculture has jurisdiction in the above-referenced proceeding, but respondent does not admit or deny the remaining allegations in the complaint.

2. The parties stipulate and agree to waive any requirements that the final decision in these proceedings contain findings and conclusion with respect to all material issues of fact, law, or discretion, as well as the reasons or based thereof; and

4. The parties stipulate and agree to waive all rights to seek judicial review and otherwise challenge or contest the validity of this decision.

5. The respondent waives any action under the Equal Access to Justice Act of 1980 (5 U.S.C. Section 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with the above-referenced proceeding.

Findings of Fact

1. United Airlines is a corporation doing business at Honolulu International Airport, Honolulu, Hawaii.

2. Respondent Elizabeth Mann is an employee of United Airlines at Honolulu International Airport.

3. In the course of her employment for United Airlines, respondent Elizabeth Mann handles baggage moving from Honolulu International Airport to the continental United States.

Conclusion

The parties having admitted the jurisdictional facts and having agreed to the provisions set forth in the instant order in disposition of the above-referenced proceeding, such order and decision will be issued.

Order

1. Elizabeth Mann shall pay the sum of one hundred dollars (\$100) in settlement of this matter. Respondent Elizabeth Mann shall send, payable to the "Treasurer of the United States," a certified check or money order for said amount to Mark Dopp, Office of the General Counsel, Room 2422 South Building, United States De-

partment of Agriculture, Washington, D.C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day that a signed copy of this order is served upon the respondent.

In re: ART PAUL. P.Q. Docket No. 60. Decided January 9, 1986.

Robert Brownard, Reg. Div. OGC, for complainant.
John Tedesco, Chicago, Illinois, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

The above-referenced proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended ("Act"), (7 U.S.C. Section 151 *et seq.*) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondent violated the Act and regulations promulgated thereunder (7 CFR Section 318.13 *et seq.*). The parties have agreed that the above-referenced proceeding should be terminated by entry of this Consent Decision and have agreed to the following stipulations:

1. For the purpose of this Consent Decision only, the respondent admits that the Secretary of the United States Department of Agriculture has jurisdiction in the above-referenced proceeding, but respondent does not admit or deny the remaining allegations in the complaint.

2. The parties stipulate and agree to the issuance of this Consent Decision without further procedures.

3. The parties stipulate and agree to waive any requirements that the final decision in these proceedings contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof; and

4. The parties stipulate and agree to waive all rights to seek judicial review and otherwise challenge or contest the validity of this decision.

5. The respondent waives any action under the Equal Access to Justice Act of 1980 (5 U.S.C. Section 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with the above-referenced proceeding.

FINDINGS OF FACT

1. United Airlines is a corporation doing business at Honolulu International Airport, Honolulu, Hawaii.

2. Respondent Art Paul is an employee of United Airlines at Honolulu International Airport.

3. In the course of his employment for United Airlines, respondent Art Paul handles baggage moving from Honolulu International Airport to the continental United States.

CONCLUSIONS

The parties having admitted the jurisdictional fact and having agreed to the provisions set forth in the instant order in disposition of the above-referenced proceeding, such order and decision will be issued.

ORDER

1. Art Paul shall pay the sum of one hundred dollars (\$100) in settlement of this matter. Respondent Art Paul shall send, payable to the "Treasurer of the United States," a certified check or money order for said amount to Mark Dopp, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day that a signed copy of this order is served upon the respondent.

In re: UNITED AIRLINES. P.Q. Docket No. 51. Decided January 13, 1986.

Robert L. Brownard, for complainant.

Sylvia Bateman, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION

The above-referenced proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended ("Act") (7 U.S.C. §§ 161 and 162), the Act of February 2, 1903, as amended (21 U.S.C. §§ 111 and 120), and the Federal Plant Pest Act, as amended (7 U.S.C. § 150aa *et seq.*), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondent violated the Acts and regulations promulgated thereunder (7 CFR § 330.100 *et seq.* and 9 CFR § 94.1 *et seq.*). The parties have agreed that the above-referenced proceeding should be terminated by entry of this Consent Decision and have agreed to the following stipulations:

1. For the purpose of this Consent Decision only, the respondent admits that the Secretary of the United States Department of Agriculture has jurisdiction in the above-referenced proceeding, but respondent does not admit or deny the remaining allegations in the complaint.

2. The parties stipulate and agree to the issuance of this Consent Decision without further procedures.

3. The parties stipulate and agree to waive any requirements that the final decision in these proceedings contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof; and

4. The parties stipulate and agree to waive all rights to seek judicial review and otherwise challenge or contest the validity of this decision.

5. The respondent waives any action under the Equal Access to Justice Act of 1980 (5 U.S.C. Section 504 *et seq.*), for fees and other expenses incurred by the respondent in connection with the above-referenced proceeding.

FINDINGS OF FACT

1. United Airlines is a corporation doing business at Stapleton International Airport, Denver, Colorado.

2. In the course of doing business, United Airlines handles foreign-origin garbage at Stapleton International Airport.

CONCLUSIONS

The parties having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of this proceeding, such order and decision are hereby issued.

ORDER

Respondent United Airlines shall pay three hundred seventy-five dollars (\$375) in settlement of this matter. Respondent United Airlines shall send, payable to the "Treasurer of the United States," a certified check or money order for said amount to Robert L. Broussard, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day that a signed copy of this order is served upon the respondent.

In re: D & K CORPORATION, INC. P.Q. Docket No. 146. Decided January 15, 1986.

*Kris H. Hejiri, for complainant.
Respondent, pro se.*

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Act of February 1903, as amended (21 U.S.C. § 111 and § 120) and the Act of July 1962 (21 U.S.C. § 134 *et seq.*), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that D & K Corporation, Inc., violated the Acts and regulation promulgated thereunder (9 CFR § 94.1 and § 95.1 *et seq.*). Respondent D & K Corporation, Inc., and the complainant have agreed this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulation:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent D & K Corporation, Inc. admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admit nor denies the remaining allegations of the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. D & K Corporation, Inc., also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by it in connection with this proceeding.

FINDINGS OF FACT

1. D & K Corporation, Inc., respondent herein, is a corporation doing business within the territorial limits of the United States, and whose mailing address is P. O. Box 3567, Agana, Guam 96910.

2. On or about February 8, 1985, the respondent imported from Hong Kong to Guam, pork product of fried shredded pork.

3. On or about February 8, 1985, the respondent imported from Hong Kong to Guam, animal bones and deer antlers.

4. On or about February 8, 1985, the respondent imported from Hong Kong to Guam, animal manure.

CONCLUSIONS

Respondent D & K Corporation, Inc., having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

Respondent D & K Corporation, Inc., is assessed a civil penalty of one thousand five hundred dollars (1,500.00) which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Kris H. Ikajiri, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D.C., 20250-1400, on or before January 31, 1986.

This order shall become effective on the day this order is served upon the respondent.

In re: CANDIDO SANCHEZ. P.Q. Docket No. 89. Decided December 6, 1985.

Ronald A. Cipolla, for complainant.
Respondent, pro se.

Decision by Victor W. Palmer, Administrative Law Judge.

DEFAULT DECISION AND ORDER

This proceeding was instituted under the Act of February 2, 1903, as amended, (Act) (21 U.S.C. §§ 111 and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that the respondent violated section 92.2(a) of the regulations promulgated thereunder (9 CFR § 92.2(a)). Copies of the complaint and the Rules of Practice Governing Proceedings Under the Act were served by the Hearing Clerk, by certified mail, upon respondent.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) applicable to this proceeding, respondent was informed in the complaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer to, or plead specifically to,

any allegation in the complaint would constitute an admission of such allegation pursuant to section 1.141 of the Rules of Practice (7 CFR § 1.141), and a waiver of such hearing. The letter also advised the respondent that failure to request an oral hearing within the time for filing an answer would constitute a waiver, on his part, of oral hearing. Respondent has failed to respond in any manner to allegations in the complaint and respondent has not requested an oral hearing.

Respondent's failure to deny or otherwise respond to the allegations in the complaint constitutes an admission of such allegations, pursuant to section 1.136(c) of the Rules of Practice (7 CFR § 1.136(c)). Respondent's failure to request a hearing constitutes a waiver of such hearing. There being no basis for a hearing, the material allegations of fact in the complaint are adopted and set forth as the Findings of Fact.

FINDINGS OF FACT

1. Candido Sanchez, herein referred to as respondent, is an individual whose address is 202 Calle Arzuaga, Rio Piedras, Puerto Rico.

2. On or about October 29, 1984, the respondent violated section 318.58-2 of the regulations (7 CFR § 318.58-2) in that the respondent offered for shipment to a common carrier, for movement to Philadelphia, Pennsylvania, three (3) cases of jobo (*Spondias dulcis*), a prohibited fruit, at International Airport, Isla Verde, Puerto Rico.

CONCLUSION

Respondent has failed to respond in any manner to the allegation of the complaint. By reason of the Findings of Fact set forth above the respondent has violated the Act and the regulations promulgated thereunder. Therefore, the following order is issued.

ORDER

Respondent Candido Sanchez is hereby assessed a civil penalty of seven hundred fifty dollars (\$750). The respondent shall send, payable to the "Treasury of the United States" a certified check or money order, to Mark D. Dopp, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250, not later than thirty (30) days from the effective date of this order. This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursu-

ant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR # 1.145).

[The Default Decision and Order became final on January 17, 1986.—Ed.]

In re: IVER BUGGE, P.Q. Docket No. 133. Decided January 24, 1986.

Juru Rulcy, for complainant.

Respondent, *pro se*.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120) and the Federal Plant Pest Act, as amended (Act) (7 U.S.C. §§ 150na *et seq.*) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Iver Bugge, respondent, violated the Acts and regulations promulgated thereunder (9 CFR § 95.4 and 7 CFR § 330.400). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with the proceeding.

FINDINGS OF FACT

1. Iver Bugge, respondent, has as its principal place of business Storgaten 52, Post Boks 160, N-3251, Larvik, Norway. Its duly au-

thorized agent in the United States is Kerr Steam Ship Company, Inc., American General Tower, Suite 1500, 2727 Allen Parkway, Houston, Texas 77019.

2. On or about April 29, 1985, the respondent stored regulated garbage aboard the vessel M/T Iver Chaser, which was docked at the Barbours Cut Terminal, Houston, Texas.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of three hundred dollars (\$300.00). The respondent shall send a certified check or money order for \$300.00 payable to the "Treasurer of the United States," to Jaru Ruley, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, not later than thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: ANDREA LEO. P.Q. Docket No. 114. Decided January 27, 1986.

Importation of not fully cooked salamis.

The Judicial Officer affirmed Judge McGrail's order assessing a \$250 civil penalty against respondent for importing pork salamis that had not been fully cooked as required from Italy to the United States. Respondent's violation, although inadvertent, was a very serious violation warranting a \$250 civil penalty.

Sherrie Kopke Kennedy, for complainant.

Respondent, pro se.

Edward H. McGrail, Administrative Law Judge.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a proceeding under the Act of February 2, 1903, as amended (21 U.S.C. §§ 111 *et seq.*), in which Administrative Law Judge Edward H. McGrail (ALJ) filed an initial Decision and Order on October 10, 1985, assessing a civil penalty of \$250 against respondent for importing pork salamis that had not been fully cooked

by a commercial method in a container hermetically sealed promptly after filling, but before such cooking, as required, from Italy to the United States in violation of the Act and regulations.

On October 30, 1985, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.35).¹ The case was referred to the Judicial Officer for decision on November 15, 1985.

Based upon a careful consideration of the record, the initial Decision and Order is adopted as the final Decision and Order in this case, except that the effective date of the order is changed in view of the appeal. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

PRELIMINARY STATEMENT

This proceeding was instituted under the Act of February 2, 1908, as amended (Act) (21 U.S.C. § 111), by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint was filed with the Hearing Clerk on July 15, 1985. The complaint alleged that the respondent violated section 111 of the Act and section 94.8(a) of the regulations promulgated thereunder (9 CFR § 94.8(a)).

Copies of the complaint and the Rules of Practice governing proceedings under the Act were served by the Hearing Clerk, by certified mail, upon respondent on July 25, 1985. On August 19, 1985, respondent was sent, by regular mail, a notice that his answer had not been received by the Hearing Clerk in the allotted time.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) applicable to this proceeding, respondent was informed in the complaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to deny or otherwise respond to the allegations in the complaint and request an oral hearing would constitute an admission of such allegations and a waiver of such hearing.

¹ The position of the Judicial Officer was established pursuant to the Act of April 4, 1946 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), reprinted in 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

More than twenty (20) days have elapsed since respondent was served with the complaint in question. Respondent has not filed an answer to date. This Decision and Order, therefore, is issued pursuant to sections 1.136 and 1.139 of the Rules of Practice applicable to this proceeding (7 CFR §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as the findings of fact.

FINDINGS OF FACT

1. Andrea Leo, respondent, is an individual whose address is 1363 Merry Avenue, Bronx, New York 10461.

2. On or about September 3, 1984, the respondent imported into the United States at J.F.K. Airport in Jamaica, New York, from Italy, approximately three (3) pork salamis in violation of section 94.8(a) of the regulations (9 CFR § 94.8(a)), because the pork salamis had not been fully cooked by a commercial method in a container hermetically sealed promptly after filling but before such cooking, as required.

CONCLUSIONS

By reason of the facts in the finding of fact set forth above, respondent has violated the Act and regulations promulgated thereunder. Therefore, the following Order is issued.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent's violation, although inadvertent, was a very serious violation of the Act and regulations. African swine fever is potentially the most dangerous and destructive of all communicable swine diseases. This virus is highly virulent and may be present in pork products, such as salami, originating in countries where the disease exists, such as Italy. The only known practical method of destroying the contagion of the disease in pork products is by heat treatment. Accordingly, a civil penalty of \$250 should be imposed. *In re Lopez*, 44 Agric. Dec. ____ (Oct. 7, 1985).

ORDER

General Counsel, Room 2422, South Building, Washington, D. C.
20250-1400.

In re: SHARON GORDON. P.Q. Docket No. 158. Decided January 29,
1986.

Joseph Pembroke, for complainant.
Respondent, pro se.

Decision by Edward H. McGrail, Administrative Law Judge.

ORDER DISMISSING COMPLAINT

By motion, filed January 24, 1986, Complainant seeks dismissal
of the complaint in this matter.

IT IS ORDERED, that the complaint issued in this matter, filed
December 3, 1985, be, and hereby is, dismissed.

In re: RENE VALLALTA. P.Q. Docket No. 138. Filed February 5, 1986.
Illegal plant importation.

Filed by William J. Weber, Administrative Law Judge.

Answered by Donald A. Campbell, Judicial Officer.

CERTIFICATION OF QUESTIONS TO THE JUDICIAL OFFICER

Complainant charges that Respondent illegally imported one (1)
cacao seed pod.

The Respondent states, *inter alia*, that:

"But obviously [sic] while she was helping my wife to pack the clothes of my children she put those seeds in one of the suitcases, I explained the officer that I had no reason to bring those seeds.

"Every time I enter thru Los Angeles I had seen when officers take away fruits from passengers (mango, avocados etc.) People that travel for the first time are ignorant of the customs restrictions, [sic] they ignore that California is one of the largest producer of avocados. Like I said before I had enter thru New York, Portland, Houston, Miami, Los Angeles, New Orleans, and I had never before had any problems at any port of entry. * * *" (Respondent's letter filed November 13, 1985, answering the Complaint allegations).

Essentially, he contends that his failure to declare the cacao seed pod to the Customs officer was due to lack of knowledge that it had been placed in the baggage contrary, to his explicit instructions.

Respondent also contends that he was subjected to racial slurs by a second Customs officer at the time he was trying to explain the situation to the first Customs officer. While this is not directly relevant to the key issues, it upset him and arguably created emotional distress which effectively reduced his capacity to rationally discuss and evaluate the alleged violation at the scene and might explain why a compromise settlement was not accepted by him earlier.

Respondent contends that he had no knowledge of the cacao seed in the luggage and that he is innocent.

Complainant's response in opposition to the Respondent's request for a hearing filed January 3, 1986, states:

"* * * On October 7, 1985, Judicial Officer Donald A. Campbell issued his decision in, *In re: Richard Duran Lopez*, P.Q. Docket No. 59 (Exhibit A). The *Lopez* decision is controlling in this matter. On page 8 of the decision, the Judicial Officer states that:

Respondent's answer does not disclose an acceptable mitigating circumstance.

"Complainant offered to settle this matter for a sum considerably less than the requested civil penalty of \$250. In the settlement letter to the respondent, complainant enclosed a copy of the *Lopez* decision. Respondent rejected the offer, and has requested a hearing.

"Section 1.141, subparts (a) and (b) of the Rules of Practice (7 CFR § 1.141 (a) and (b)) provides, in part, that (a) 'Any party may request a hearing on the facts . . . ' and (b) 'If any material issue of fact is joined by the pleadings . . . ' The respondent admitted all the facts in his answer. The only issue is the sanction, and the Judicial Officer has stated the Department's position, at page 14 of the decision,

'To summarize, where a person *unintentionally* violates a quarantine regulation issued under the Plant Quarantine Act by bringing a prohibited article into the United States, and the matter is not settled informally, the *minimum* civil penalty that will be imposed by the Judicial Officer in a formal case . . . is \$250.' (Emphasis in the original).

"WHEREFORE, complainant request that:

- 1) The respondent's request for a hearing be denied, and
- 2) That the Administrative Law Judge grant the order requested in the complaint. (Complainant's Response filed January 3, 1986, in Opposition to Respondent's Request for a Hearing.)

If "unintentional" is construed to include "unknowing" then Complainant's position may have merit under the cited precedent.

Further, there appears to have been five family members traveling together with five pieces of luggage for the family group. No issue is raised concerning the various pieces of luggage, their contents, and the various members of the family group, nor how the luggage was packed with reference to these people.

The following questions are certified to the United States Department of Agriculture Judicial Officer:

- (1) Should Respondent's motion for hearing be denied?
Yes D.A.C. 1/10/86

(2) If no hearing is appropriate and if Complainant files a motion for a decision on the pleadings, should that decision be entered finding a violation and assessing a \$250.00 civil penalty against Respondent Rene Vallalta? Yes.
D.A.C. 1/10/86

In re: UBERM S.A. P.Q. Docket No. 160. Decided February 6, 1986.

Jerry Rulley, Reg. Div., OGC, for complainant.

Thomas Clark, Duluth, MN, for respondent.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120) and the Federal Plant Pest Act, as amended (Act) (7 U.S.C. §§ 150aa *et seq.*) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that UBERM S.A., respondent, violated the Acts and regulations promulgated thereunder (9 CFR § 95.4 and 7 CFR § 330.400). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

FINDINGS OF FACT

1. Ubem S.A., respondent, is a foreign business whose agent in the United States is Federal Marine Terminals, Inc., 606 Board of Trade Building, Duluth, Minnesota 55802.

2. On or about June 5, 1985, the respondent stored regulated garbage aboard the vessel M/V Federal Thames, at Duluth, Minnesota.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of two hundred fifty dollars (\$250.00). The respondent shall send a certified check or money order for \$250.00 payable to the "Treasurer of the United States," to Jaru Ruley, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250 1400, not later than thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

1

In re: NORTH AMERICAN VAN LINES, INC. P.Q. Docket No. 156. Decided February 10, 1986.

Kevin Thiemann, for complainant.

Mark J. Andrews, Washington, D.C., for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Plant Quarantine Act of August 29, 1912, as amended, and the Federal Plant Pest Act (7 U.S.C. §§ 151-164a and 167, and 150aa *et seq.*) (Acts) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that North American Van Lines, Inc., respondent, violated the Acts and regulations promulgated thereunder (7 CFR § 301.45 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. North American Van Lines, Inc., respondent, is a corporation doing business at Fort Wayne, Indiana, and whose address is P. O. Box 988, Fort Wayne, Indiana 46801.

2. On or about April 26, 1985, the respondent moved interstate outdoor household articles from Gales Ferry, Connecticut, a gypsy moth high risk area, to San Jose, California, a gypsy moth non-regulated area.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of this proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of seven hundred dollars (\$700.00) which shall be payable to the "Treasurer of the United States", by certified check or money order, and which shall be forwarded to Kevin B. Thiemann, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, 12th and Independence Avenue, S. W., Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: NORTH AMERICAN VAN LINES, INC. and E. ERNY (RAYMOND J. ERNY). P.Q. Docket No. 156. Decided February 10, 1986.

Kevin Thiemann, Reg. Div., OGC, for complainant.

Mark Andrews, Washington, D.C., for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

DISMISSAL OF COMPLAINT AS TO RESPONDENT RAYMOND J. ERNY

Pursuant to Motion therefor, and for good cause shown, the Complaint filed herein on November 25, 1985, is hereby dismissed as to Respondent E. Erny (Raymond J. Erny).

In re: FRANCISCO PAULINO. P.Q. Docket No. 171. Decided February 10, 1986.

Sherrie Kopka Kennedy, Reg. Div. OGC, for complainant.

Respondent, pro se.

Decision by Victor W. Palmer, Administrative Law Judge.

DISMISSAL OF COMPLAINT

For good cause shown by complainant, the complaint that was filed herein against Francisco Paulino on January 8, 1986, is herewith dismissed.

In re: PAN AMERICAN WORLD AIRWAYS, INC. P.Q. Docket No. 98. Decided February 12, 1986.

Clement J. McGovern, for complainant.

Carl Haberbusch, Pan American World Airways, Inc., New York, N.Y., for respondent.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120), by a complaint filed by the Administrator of the Animal and Plant Health Inspec-

tion Service alleging that the respondent violated the Act and regulations promulgated thereunder (7 CFR § 318.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purpose of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedures;

(b) Any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Pan American World Airways, Inc., respondent, is a corporation doing business at Honolulu International Airport, Honolulu, Hawaii, with a mailing address of Post Office Box 29900, Honolulu, Hawaii 96820.

2. On or about January 25, 1985, respondent at Honolulu International Airport, had in its possession a piece of baggage destined for Washington, D. C. via Pan American Flight 838/72 and Flight 581.

3. On or about May 28, 1985, respondent at Honolulu International Airport, had in its possession nine (9) pieces of baggage destined for Los Angeles, California via Pan American Flight 3812.

4. On or about July 1, 1985, respondent at Honolulu International Airport, had in its possession five (5) pieces of baggage destined for Los Angeles, California via Pan American Flight 812.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in

disposition of this proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of two thousand dollars (\$2,000). The respondent shall send, payable to the "Treasury of the United States" a certified check or money order, to Clement J. McGovern, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day this order is served upon the respondent.

In re: PAN AMERICAN WORLD AIRWAYS, INC. P.Q. Docket No. 90. Decided February 13, 1986.

Clement J. McGovern, for complainant.

Carl Huberbusch, Pan American World Airways, Inc., New York, N.Y., for respondent.

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondent violated the Act and regulations promulgated thereunder (7 CFR § 318.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purpose of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedures;

(b) Any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issue of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in this proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Pan American World Airways, Inc., respondent, is a corporation doing business at 6501 W. Imperial Highway, P. O. Box 9227B, Los Angeles, California 90009.

2. On or about July 19, 1984, the respondent had in its possession at Los Angeles Airport, 22 cartons of CYMBIDIUM ORCHID blooms which had been imported from Australia on Pan American flight 816 and which were subsequently placed on Agricultural Hold.

3. On or about August 8, 1984, the respondent had in its possession, at Los Angeles Airport a box of orchid blooms which had been imported from New Zealand on Pan American flight 816 and subsequently placed on agricultural hold.

4. On or about October 17, 1984, the respondent had in its possession, at Los Angeles Airport, certain palm on ARAUCARIA seedlings which were imported from Australia and subsequently placed on agricultural hold.

5. On or about August 1, 1984, the respondent had in its possession at Los Angeles Airport, certain ATROPURPUREM SEEDS (bean seeds) which were imported from Australia on Pan American Flight 812 and required treatment for soybean rust.

CONCLUSIONS

The respondent having admitted the jurisdiction facts and having agreed to the provisions set forth in the following order in disposition of this proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of three thousand dollars (\$3,000). The respondent shall send, payable to the "Treasury of the United States" a certified check or money order, to Clement J. McGovern, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D.

C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day this order is served upon the respondent.

In re: FRANCISCO RAMOS. P.Q. Docket No. 36. Decided December 24, 1985.

Importation of limes without a permit—Civil penalty.

Fronzo Woods, for complainant.
Respondent, *pro se*.

Decision by William J. Weber, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This proceeding was instituted under the Act of August 20, 1912, as amended, (Act) (7 U.S.C. §§ 151-164a, 167) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that the respondent violated section 319.56-2(e) of the regulations promulgated thereunder (7 CFR § 319.56-2(e)) by importing limes from Mexico into the United States without a permit. Copies of the complaint and the Rules of Practice governing proceedings under the Act were served by the Hearing Clerk, by certified mail, upon respondent. Respondent was informed in the complaint and the letter of service that failure to plead specifically to any allegation of the complaint would constitute an admission of such allegation.

On February 20, 1985, the respondent filed an answer in which he admitted that he had a bag of lemons as he crossed the border between the United States and Mexico on September 16, 1984. Respondent did not deny that he had no permit for the fruit. Under section 1.136(c) of the Rules of Practice (7 CFR § 1.136(c)), respondent thus admitted the allegations of the complaint.

On June 24, 1985, Judicial Officer Donald A. Campbell ruled that respondent, in his answer, admitted that he violated the Act and regulations promulgated thereunder (Ruling on Reconsideration, P.Q. Docket No. 36). Under Section 1.139 of the Rules of Practice (7 CFR § 1.139), the admission by the answer of all the material allegations of fact contained in the complaint constitutes a waiver of hearing.

The Judicial Officer further ruled, in effect, that if complainant stipulated to the facts alleged in respondent's answer, no hearing would be needed to determine the sanction to be imposed. Accordingly, complainant hereby stipulates to the facts alleged in respondent's answer, making a hearing unnecessary. Furthermore, on September 10, 1985, the Judicial Officer ruled that the facts alleged in respondent's answer do not constitute mitigating circumstances. *In re Lopez*, P. Q. Docket No. 59, Tentative Decision and Order, at 10. There is thus no basis for reducing the requested sanction.

As there is no basis for a hearing, the material allegations of fact in the complaint are adopted and set forth as the Findings of Fact.

FINDINGS OF FACT

1. Francisco Ramos, respondent, is an individual whose address is 1336 Glencroft Road, Glendora, California 91740.

2. On or about September 16, 1984, respondent imported 2.5 pounds of limes from Mexico into the United States in violation of section 319.56-2(e) of the regulations (7 CFR § 319.56-2(e)), because the fruit was not accompanied by a permit.

CONCLUSIONS

In his answer, respondent did not deny any of the material allegations in the complaint. In addition, the facts alleged in respondent's answer constitute no basis for reducing the requested sanction.

By reason of the Findings of Fact set forth above, the respondent has violated the Act and regulations promulgated thereunder. The following order is therefore issued.

ORDER

Respondent Francisco Ramos is hereby assessed a civil penalty of two hundred fifty dollars (\$250). The respondent shall send, payable to the "Treasurer of the United States" a certified check or money order, to Fronda C. Woods, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, no later than thirty (30) days from the effective date of this order. This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent (7 CFR 1.142(c)), unless there is an appeal to the Judicial Officer *within 30 days of service* pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[This decision and order became final February 18, 1986.—Ed.]

In re: MAGUALITA ROSE RENCARGE. P.Q. Docket No. 125. Decided
December 23, 1985.

Thomas Bundy, for complainant.

Respondent, *pro se*.

Decision by John A. Campbell, Administrative Law Judge.

DEFAULT DECISION AND ORDER

PRELIMINARY STATEMENT

This proceeding was instituted under the Act of August 20, 1912, as amended, (Act) (7 U.S.C. §§ 151-164a and 167) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that the respondent violated section 319.56 of the regulations promulgated thereunder (7 CFR § 319.56). Copies of the complaint and the Rules of Practice Governing Proceedings Under the Act were served by the Hearing Clerk, by certified mail, upon respondent.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) applicable to this proceeding, respondent was informed in the complaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer to, or plead specifically to, any allegation in the complaint would constitute an admission of each allegation pursuant to section 1.141 of the Rules of Practice (7 CFR § 1.141), and a waiver of such hearing. The letter also advised the respondent that failure to request an oral hearing within the time for filing an answer would constitute a waiver, on his part, of oral hearing. Respondent has failed to respond in any manner to allegations in the complaint and respondent has not requested an oral hearing.

Respondent's failure to deny or otherwise respond to the allegations in the complaint constitutes an admission of such allegations, pursuant to section 1.136(c) of the Rules of Practice (7 CFR § 1.136(c)). Respondent's failure to request a hearing constitutes a waiver of such hearing. There being no basis for a hearing, the material allegations of fact in the complaint are adopted and set forth as the Findings of Fact.

FINDINGS OF FACT

1. Magualita Rose Rencarge, herein referred to as the respondent, is an individual whose address is 5905 Santa Maria, Laredo, Texas 78041.

2. On or about February 27, 1985, the respondent transported sixteen (16) limes into the United States from Mexico in violation of section 319.56 of the regulations (7 CFR § 319.56), because the limes were imported without a permit, as required.

CONCLUSION

Respondent has failed to respond in any manner to the allegation of the complaint. By reason of the Findings of Fact set forth above the respondent has violated the Act and the regulations promulgated thereunder. Therefore, the following order is issued.

ORDER

Respondent Magualita Rose Rencarge is hereby assessed a civil penalty of two hundred fifty dollars (\$250). The respondent shall send, payable to the "Treasury of the United States" a certified check or money order, to Mark D. Dopp, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250, not later than thirty (30) days from the effective date of this order. This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR # 1.145).

[The Default Decision and Order became final on February 17, 1986.—Ed.]

In re: AUTO LINERS, INC. P.Q. Docket No. 166. Decided February 19, 1986.

*Proveda Woods, for complainant.
Respondent, pro se.*

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION

On December 23, 1985, this proceeding was instituted under the Act of February 2, 1903, as amended, (21 U.S.C. §§ 111 and 120), the Plant Quarantine Act of August 20, 1912, as amended (7 U.S.C.

§§ 151-164a, 167), and the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj) (Acts), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service. The complaint alleged that the respondent violated the Acts and regulations promulgated thereunder (7 CFR §§ 330.100-300.400 and 9 CFR § 94.5 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

- (a) any further procedure;
- (b) any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;
- (c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Auto Liners, Inc. respondent, is a corporation whose address is 100 East 42nd Street, New York, New York 10017.

2. On or about June 4, 1985, the respondent brought foreign origin garbage into Jacksonville, Florida, on its ship the M/V Oppama Maru.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of the proceeding, such order will be issued.

ORDER

Respondent Auto Liners, Inc. is assessed a civil penalty of two hundred fifty dollars (\$250) which shall be payable to the "Treasurer of the United States" by certified check or money order, and

which shall be forwarded to Fronda C. Woods, Office of the General Counsel, Room 2422-South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day this order is served upon the respondent.

*In re: DAVID E. MCCracken and DAVID R. WEBB Co., Inc. P.Q.
Docket No. 169. Decided February 20, 1986.*

Sherris J. Kennedy, for complainant.

Art Beck, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Federal Plant Pest Act, as amended (7 U.S.C. § 150aa *et seq.*) and the Act of August 20, 1912, as amended (Plant Quarantine Act) (7 U.S.C. §§ 151-164a and 167), by a Complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondents violated the Acts and regulations promulgated thereunder (7 CFR § 301.45 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purpose of this stipulation and the provisions of this Consent Decision only, respondents admit specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, admit the Findings of Fact set forth below, and waive:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondents also stipulate and agree that the United States Department of Agriculture is the "prevailing party" in the proceeding and waive any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980

04 *et seq.*) for fees and other expenses incurred by the in connection with this proceeding.

FINDINGS OF FACT

1. David E. McCracken, herein referred to as the respondent, is an individual whose address is 4707 Sloan Drive, Jeffersonville, Indiana 47130.

2. David R. Webb Company, Inc., herein referred to as the respondent, is a business located at 206 South Holland Street, Edinburgh, Indiana 46124.

3. On or about March 18, 1985, the respondents moved interstate regulated articles, specifically, approximately fourteen (14) logs, from Somerset County, Pennsylvania, a gypsy moth high-risk area, into Edinburgh located in Johnson County, Indiana, a non-regulated area.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

1. The respondent, David E. McCracken, is assessed a civil penalty of two hundred fifty dollars (\$250.00) which shall be payable to the "Treasurer of the United States," by certified check or money order, and which shall be forwarded to Sherrie Kopka Kennedy, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this Order.

2. The respondent, David R. Webb Co., Inc., is assessed a civil penalty of five hundred dollars (\$500.00) which shall be payable to the "Treasurer of the United States," by certified check or money order, and which shall be forwarded to Sherrie Kopka Kennedy, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D.C., 20250-1400, within thirty (30) days from the effective date of this Order.

3. This Order shall become effective on the day upon which service of this Order is made upon the respondents.

In re: JAMES KANDA and WORLD AIRWAYS, INC. P.Q. Docket No. 74.
Decided February 21, 1986.

Praxda Woods, for complainant.
Respondent, pro se.

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION FOR WORLD AIRWAYS, INC.

On March 26, 1985, this proceeding was instituted under the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj) (Act), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service. The complaint alleged that the respondents violated the Act and regulations promulgated thereunder (7 CFR § 318.13 *et seq.*). On November 25, 1985, a motion was filed to dismiss the complaint against respondent James Kanda. The Honorable Edward H. McGrail, Administrative Law Judge, granted the motion on November 26, 1985. World Airways, Inc., is the only remaining respondent. The parties have agreed that the proceeding with respect to World Airways should be terminated by entry of the Consent Decision set forth below. The parties have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent World Airways specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons of bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent World Airways also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. World Airways, Inc., respondent, is a corporation whose mailing address is Terminal Box 26, Honolulu International Airport, Honolulu, Hawaii 96819.

2. On or about October 31, 1984, at Honolulu International Airport, the respondent checked baggage to the mainland United States.

CONCLUSIONS

The respondent has admitted the jurisdictional facts and has agreed to the provisions set forth in the following order in disposition of the proceeding. Therefore, such order will be issued.

ORDER

Respondent World Airways is assessed a civil penalty of three hundred seventy-five dollars (\$375) which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Fronda C. Woods, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon respondent.

In re: KAPPALARAN SHIPPING COMPANY. P.Q. Docket No. 145. Decided February 21, 1986.

Jara Ruley, for complainant.

Abe Phillips, for respondent.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Federal Plant Pest Act, as amended (Act) (7 U.S.C. §§ 150 *an et seq.*) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Kappalaran Shipping Company, respondent, violated the Act and regulations promulgated thereunder (7 CFR § 330.400). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only and this specific proceeding only, re-

spondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

3. The civil penalty assessed herein, when paid, shall stand as final disposition of all charges against and full and final satisfaction of all liability of the respondent, Kappalaran Shipping Company, the M/V STAR KANDA, her master, officers and crew, and her owners, operators, charterers, and agents, and all of their agents, servants and employees, with respect to the matters and things charged and/or alleged in this proceeding.

4. The Animal and Plant Health Inspection Service, USDA, will not use the admissions made herein to pursue any other matter arising out of Respondent's storage of regulated garbage aboard the vessel M/V STAR KANDA which was docked at Mobile, Alabama on or about March 7, 1985.

FINDINGS OF FACT

1. Kappalaran Shipping Company, respondent, has its principal place of business at Bonifacio Drive, Manila, Philippines. Its duly authorized agent in the United States is Star Shipping, Inc., 905 Commerce Building, Mobile, Alabama 36602.

2. On or about March 7, 1985, the respondent stored regulated garbage aboard the vessel M/V STAR KANDA, which was docked at Mobile, Alabama.

ORDER

The respondent is assessed a civil penalty of three hundred dollars (\$300.00). The respondent shall send a certified check or money order for \$300.00 payable to the "Treasurer of the United States," to Jaru Ruley, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, not later than thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service on this order is made upon the respondent.

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